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PROCEEDINGS AND ORDERS

DATE: [04/13/94]

CASE NBR: [93100496] CSX

STATUS: [DECIDED]

SHORT TITLE: [Stevens, Irving, et ux.]

VERSUS [Cannon Beach, Oregon, et al.] DATE DOCKETED: [092793]

PAGE: [01]

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Sep 27 1993 Petition for writ of certiorari filed.  
Sep 27 1993 Appendix of petitioner filed.  
Oct 12 1993 Waiver of right of respondent Oregon to respond filed.  
Oct 13 1993 DISTRIBUTED. October 29, 1993  
Oct 18 1993 Waiver of right of respondent City of Cannon Beach to  
respond filed.  
Oct 25 1993 Response requested. (Due December 23, 1993)  
Dec 23 1993 Brief of respondent Oregon in opposition filed.  
Jan 5 1994 REDISTRIBUTED. January 21, 1994  
Jan 7 1994 Reply brief of petitioners Irving and Jeanette Stevens  
filed.  
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PAGE: [02]

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Mar 21 1994 Petition DENIED. Dissenting opinion by Justice Scalia  
with whom Justice O'Connor joins. (Detached opinion.)  
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93 - 496

Supreme Court, U.S.  
FILED

SEP 27 1993

OFFICE OF THE CLERK

No. 93-\_\_\_\_\_

**In the Supreme Court  
of the United States**

October Term, 1993

\_\_\_\_\_  
IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
OREGON, by and through its Department  
of Parks and Recreation,

Respondents.  
\_\_\_\_\_

Petition for a Writ of Certiorari To the  
Supreme Court Of the State of Oregon

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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62 PP

**QUESTIONS PRESENTED FOR REVIEW**

Petitioners hold title to dry sand beach property bounded by the Pacific Ocean's mean high tide line deranged from a United States patent of 1893. Their predecessors built a seawall in 1917 on the dry sand beach of Oregon and extended it north thereon in 1939, without objection. In 1957, Petitioners obtained title to dry sand north and adjacent to the above-described seawall. Twelve years later, in 1969, the Oregon Supreme Court, in State ex rel Thornton v. Hay,<sup>1</sup> held sui sponte that Oregon's dry sand beach, though owned privately, could not be developed so as to limit the public access to it for recreational purposes, because, under the English common law doctrine of Ancient Custom, the public had acquired a paramount

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<sup>1</sup>State Ex Rel Thornton, et al. v. Hay, et al., 254 Or. 584, 462 P.2d 671 (1969).

unlimited recreational right to the dry sand. In this historical context, the questions presented are:

1. Does the decision in Thornton v. Hay (finding a public recreational easement upon private beach land based upon the English Doctrine of Ancient Custom), as now interpreted by the Oregon Supreme Court below, constitute an impermissible collateral attack upon Petitioner's title deranged from the United States Patent?

2. Does the case of Thornton v. Hay, supra, by ipse dixit, transform Petitioners' private property right of exclusive use to a public property right of unlimited use?
3. Does Oregon property law, applied retroactively upon all private beach property, barring owners rights of exclusive possession, deprive Petitioners, and others similarly situated, of their property without due process of law or deny them of equal protection of state law?

### LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Oregon Supreme Court.

A joint brief was filed amicus curiae on behalf of 1000 Friends of Oregon, League of Women Voters of Oregon and the Oregon Shores Conservation Coalition in the Oregon Court of Appeals.

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No. 93-\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
OREGON, by and through its Department  
of Parks and Recreation,

Respondents.

On Writ of Certiorari To the  
Supreme Court Of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

The Petitioners Irving C. and Jeanette  
Stevens respectfully pray that a writ of  
certiorari issue to review the July 1, 1993  
judgment and opinion of the Oregon Supreme  
Court.

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**OPINIONS BELOW**

The opinion and judgment of the Oregon Supreme Court dated July 1, 1993 is reported at 317 Or. 131, 854 P.2d 449 (Or. 1993) and is reprinted in the appendix hereto as Vol. I, App. A, p. 1, *infra*. The Oregon Court of Appeals' decision is reported at 114 Or. App. 457, 835 P.2d 940 (1992), and is reprinted in the Appendix hereto as Vol I, App. B, p. 19, *infra*.

The opinion of the Circuit Court of Clatsop County, Judge Edison presiding, of January 8, 1991, was not reported, and is reprinted in Vol. I, App. C, p. 22, *infra*.

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**STATEMENT OF JURISDICTION**

Petitioners seek review from the opinion and judgment of the Oregon Supreme Court of July 1, 1993. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 USC § 1257(a).

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**CONSTITUTIONAL PROVISIONS  
AND STATUTES INVOLVED**

The Fifth Amendment of the United States Constitution provides in pertinent part:

". . . nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution, in pertinent part, states:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 1859 Act of Congress admitting Oregon to the Union is set forth in Vol. I, Appendix D, p. 26, and the Oregon Legislature Act of 1859 accepting admission to the Union is set forth at Vol I, App. D, p. 31.

The Oregon Beach Act of 1967 as amended in 1969 is set forth in pertinent part at Volume I, App. E, p. 34.

The Oregon Land Conservation and Development Commission's Goal 18 is set forth at Vol. I, App. F, p. 50.

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**STATEMENT OF THE CASE**

Petitioners' Complaint alleging a facial and an "applied" taking of their real property under a statewide land planning regulation (Goal 18 at Vol I, App. F, p. 50) was dismissed with prejudice under Rule 21A(8) of Oregon Rules of Civil Procedure, which Rule precludes the offering of facts

not pleaded.<sup>2</sup> Thus, most facts in the record are historical facts set forth in Petitioners' Briefs before the Oregon Court of Appeals, Vol. II, App G, p. 60, and in

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<sup>2</sup>ORCP21A(8):

"Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: \* \* \*

(8) failure to state ultimate facts sufficient to constitute a claim \* \* \* If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleadings, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. \* \* \*

their Petition for Review before the Oregon Supreme Court, Vol. II, App. H., p. 140.

The dismissal was based solely on the trial court's holding that the case of State Ex Rel Thornton, et al. v. Hay, et al., 254 Or. 584, 462 P.2d 671 (1969) (hereafter "Thornton"), denied Petitioners the right to exclude the public from their privately owned beach. Vol. I, App. C., p. 22.

In 1957 Petitioners purchased a single tax lot at Cannon Beach, Oregon. The property in question lays north of, and adjacent to, a seawall built on dry sands, upon which motels have existed since 1917. A plat of the property in question and the adjacent properties to the south is set out at Vol. II, App. G, p. 132A. The parcel described thereon as "Ecola Inn" has been owned by Petitioners' family since 1937. The Petitioners bought the property in question with the intent to extend the old

seawall northerly to enclose the dry sand portion of the property purchased (Tax Lot 8501). Petitioners leased the subject property to the adjacent motel owner for construction of additional motel units thereon. (Vol. II, App. G, p. 71.)

In 1967 the Oregon Legislature adopted the Oregon Beach Act which limited development of the private property on the beaches of Oregon between the 16 foot elevation and the mean high tide line. ORS 390.640 et seq., Vol I, App. E, p. 37. A 1969 Amendment set the visible line of vegetation at coordinate lines. See Vol. I, App. E, p. 47.

In 1969 the Oregon Supreme Court decided the Thornton case, which held that, at least for sixty years, the public had freely recreated on the wet sand and dry sands of Cannon Beach to such an extent as to satisfy the English doctrine of ancient

custom, thereby creating in the public a right of unlimited access upon and across the dry sand portion of all Oregon's privately owned beaches. Thereafter, Petitioners pursued various means under Oregon's Beach Act (Vol. I, App E., p. 34) to recover exclusive use of the subject property.<sup>3</sup>

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<sup>3</sup> In 1970, the year after Thornton, the Petitioners first petitioned the State for a permit to extend the seawall to the south to enclose the subject property so that additional motel units could be constructed thereon. The permit was denied. In 1982 Petitioners petitioned the state to move the Beach Bill's zone line to conform to the actual visible line of vegetation, thereby allowing construction of the seawall and motel outside the dry sand area covered by Thornton's holding. Petitioners' request was denied. Again, in 1984, Petitioners sought a zone line adjustment. Again, their request was denied. (Vol. II, App. G, p. 109.) Thus every legal avenue was pursued by Petitioners to make use of their property during the twenty years between Thornton and their second petition to construct the retaining wall in 1989, the denial of which resulted in this case.

In 1985 the Land Conservation and Development Commission amended Goal 18 of its Land Use Goals and Guidelines, which goals are binding upon all state agencies and municipal governments. The amendment prohibited the construction of upland protection unless lots were developed by January 1, 1977 or had utilities available. It further prohibited the construction of residential, commercial or industrial structures on the beach. (See Vol. I, App. F, pp. 52-53.)

In 1989 Petitioners again sought a permit to construct a seawall around the dry sand portion of their property (Tax Lot 8501) from the City of Cannon Beach, the State of Oregon's Department of Parks and Recreation and the State's Division of State Lands under the Oregon Beach Act. Each agency denied the permit based, in part, upon the Land Conservation Commission's

Goal 18 prohibition against construction of shorefront protection or industrial, residential or commercial structures on the beach property. Petitioners' present suit followed.

Petitioners filed suit in the Circuit Court of Clatsop County alleging that the State and the City of Cannon Beach's denials constituted both a facial and "as applied" takings of Petitioners' property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. The Respondents moved to dismiss both facial and applied takings claims, on the ground that the Complaint failed to state a cause of action, because Thornton held, since 1969, that Petitioners had no protected property right to exclusive use of the dry sand beach and, therefore, could not complain of Goal 18's bar of any development which limited the public's

recreational easement. The trial court agreed and dismissed the Complaint. (Vol. I, App. C, p. 22) Upon appeal, the Oregon Court of Appeals, relying on Thornton affirmed the trial court. 114 Or. App. 457 835 P.2d 940 (1992). (Vol. I, App. B, p. 19) The Supreme Court granted review (315 Or. 271) and affirmed the Court of Appeals and trial court's judgments. 317 Or. 131, 854 P.2d 449 (1993) (Vol. I, App. A, p. 1)

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**REASONS FOR GRANTING THE WRIT**

THE OREGON SUPREME COURT, IN AFFIRMING THORNTON V. HAY, FAILED TO FOLLOW FEDERAL LAW BARRING COLLATERAL ATTACK UPON CLEAR TITLE ISSUED BY A 1893 PATENT AND FAILED TO FOLLOW THE RECENT "TAKINGS," "DUE PROCESS," AND "EQUAL PROTECTION OF LAW" JURISPRUDENCE OF THIS COURT.

In 1969 the Oregon Supreme Court in Thornton held, sui sponte, that the public's

recreational use of Oregon's dry sand beaches (land between mean high tide line and the visible line of upland vegetation) was of sufficient quality and duration (at least sixty years) that, under the English doctrine of ancient custom, the public held a paramount recreational easement to such land, barring any development by the private owner of the dry sand which limited, to any extent, the public's unrestricted recreational easement.

The instant case, for the first time, presented to the Oregon high court three direct challenges to the present day validity of Thornton, i.e.:

- A. Thornton's application of the doctrine of ancient custom necessarily constitutes a prohibited collateral attack upon the patent title conveyed in 1893 contrary to applicable federal law barring such attacks.

- B. The Thornton case, by ipse dixit, transformed Petitioners' fundamental right of exclusive use of their property into a public right of permanent physical occupation thereof.
- C. Oregon property law, applied retroactively upon all private beach property, barring owners rights of exclusive possession, deprives Petitioners, and others similarly situated, of their property without due process of law and denies them of the equal protection of state law.

The importance of this case is that Oregon's high court, in affirming Thornton against each of the above challenges, places Oregon in direct conflict with this Court's prior holdings. The decision in this case also sets Oregon apart from 16 of the 19 littoral states' laws of beach front

property rights.<sup>4</sup>

A. THE THORNTON DECISION, CREATING A PUBLIC RECREATIONAL EASEMENT IN DRY SANDS, BASED ON THE DOCTRINE OF ANCIENT CUSTOM IS, NECESSARILY, A COLLATERAL ATTACK UPON THE ORIGINAL 1893 PATENT GRANTED PETITIONERS' PREDECESSOR IN TITLE.

This federal question was first raised and argued in Petitioners' opening brief before the Oregon Court of Appeals at Vol. II, App. G, pp. 23-25. It was also argued in the Oregon Supreme Court during closing

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<sup>4</sup>Hawaii has adopted its ancient custom of marking its upland boundary at the vegetation line. County of Hawaii v. Sotomura, 55 Haw 176, 182, 517 P.2d 57, 61 (1973) cert. den. 419 U.S. 872 (1974). Florida. See City of Daytona Beach v. Tona-Rama, 294 So.2d 73 (Fla 1974). Texas adopted prescription, dedication and custom not clearly differentiating which theory specifically applies in any given case. See Arrington v. Mattox, 767 SW.2d 957, 959 (Tex App 1989), and Matcha v. Mattox, 711 SW.2d 95 (Tex App 1986).

argument set forth at Vol. II, App. I, pp. 192-197.

" . . . To make a particular custom good, the following are necessary requisites.

I. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom . . . . "

Blackstone: Commentaries on Laws of England (1765-69), Vol 1, p. 76 (1979). University Chicago Press.

Petitioners' predecessor in title took the land in question along with other land (pursuant to the Homestead Act of May 20, 1862 (Chap. 75)), based on his 1886 affidavit of occupancy and homestead improvement. The patent was issued in 1893.

In 1859, Oregon was admitted to statehood by the Oregon Admission Act (11 Statute at Large 383, February 14, 1859) subject to the condition:

"\* \* \* That the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; \* \*  
\*" See Vol. I, App. D, p. 29.

The Oregon Legislature in its first extra session of 1859 accepted the condition verbatim. (Vol. I, App. D, p. 32.)

Prior to the Oregon Donation Act of September 27, 1850 (Chap. 76) there was no land tenure system in the Oregon territory and no statute under which anyone could acquire legal title from the United States. See: Shivley v. Bowlby, 152 U.S. 1 at pp. 50-51, 14 S.Ct. 548 at p. 567, 38 L.Ed. 331 at pp. 349-350 (1894).

In the present case, Respondents argued that Thornton merely enunciated a recreational servitude based upon ancient

custom, which had always been part of Oregon's common law even prior to statehood. In response, Petitioners pointed out that the issuance of the letters patent (1893 in this case) barred all prior inchoate unrecorded claims except those prior rights adjudicated in the patent proceedings and noted in the patent issued. Barker v. Harvey, 181 U.S. 481, 21 S.Ct. 690, 45 L.Ed. 963 (1901); United States v. Title Insurance and Trust Co., 265 U.S. 742, 44 S.Ct. 621, 68 L.Ed.2d 1110 (1924); and Kerns v. Leigh, 142 F. 985 (DC Or. 1906). Petitioners placed special reliance upon Summa Corporation Ltd. v. California ex rel State Lands Commission, 466 U.S. 198, 104 S.Ct. 1751, 80 L.Ed.2d 237 (1984), as clearly barring a state's claim to an inchoate interest in private property for recreational uses not presented in the patent proceedings. The Court below ignored

the Summa holding. It merely reiterated Thornton's language of varying lengths of public beach use, i.e.:

"Since the beginning of the State's political history;"

"From the time of the earliest settlement to the present day" (254 Or at p. 588);

"The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years." (Id at p. 593); and

"This land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited." (Id at p. 595.)

By so doing, it failed to distinguish its holding from this Court's rule in Summa Corp v. California, supra, in which this Court held that property held in public trust by the State of California for its citizen's recreational pleasure under that state's common law, could not survive prior

patent procedures vesting clear title to the land in a private citizen. After describing the total control over tide lands claimed by California under its asserted public trust easement this Court stated:

"The question we face is whether a property interest so substantially in derogation of the fee interest patented to petitioners' predecessors can survive the patent proceedings conducted pursuant to the statute implementing the treaty of Guadalupe Hidalgo. We think it cannot." 467 U.S. at p. 205, 104 S.Ct. at p. 1755, 80 L.Ed.2d at 243.

The same rule applies to patents of the dry sand and uplands conveyed to the patentee, as distinguished from tidelands. See Barker v. Harvey, supra, and United States v. Title and Trust Co., supra.

Thus, the conveyance in 1893 conveyed the U.S. government's title to the mean high tide line unto Petitioners' initial predecessor in interest. Borax Limited v.

Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). Thus, this case makes the Oregon common law stand in stark contrast to the controlling federal law of title and property rights to littoral land enunciated by this Court in a line of cases stretching from Barker v. Harvey, supra, and United States v. Coronado Beach Co., 225 U.S. 472, 41 S.Ct. 378, 65 L.Ed 736 (1921) and Hughes v. State of Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), to Summa Corporation v. California, supra, decided in 1984.

This results in the anomalous condition that Oregon, by its incantation of the language of Thornton, may avoid the federal common law of littoral property whereas her sister states of California and Washington have been required to adhere to that uniform federal law through the decisions in Hughes, supra, and Summa, supra.

B. THE THORNTON CASE, AS NOW INTERPRETED BY THE OREGON SUPREME COURT, IN THIS CASE, TRANSFORMS, BY IPSE DIXIT, PETITIONERS' FUNDAMENTAL PROPERTY RIGHT OF EXCLUSIVE POSSESSION OF THE DRY SAND INTO A PERMANENT PHYSICAL OCCUPATION BY THE PUBLIC FOR THEIR UNLIMITED RECREATIONAL PLEASURE.

This federal takings question was raised in Petitioners' brief opposing dismissal of Petitioners' Complaint. It was also raised in Petitioners' opening appellants' brief (Vol. II, App. G, pp. 28-39) and in Petitioners' Petition for Review at Appendix (Vol. II, App. H, pp. 147-154). The argument against retroactive application of Thornton was raised following the decision in Lucas v. South Carolina Coastal Council, 505 U.S. \_\_\_, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), by Petitioners' Memorandum of Additional Authorities filed after oral argument with the Oregon Court of

Appeals on July 1, 1992 and again in Petitioners' Petition for Review at Vol. II, App. H, pp. 154-168.

Thornton's use of the doctrine of ancient custom came about by the Oregon Supreme Court's own volition. The case was tried and decided upon the fictional legal theory of implied dedication. But the high court found a better ground, i.e., ancient custom, in order to avoid tract by tract litigation and to apply a uniform rule upon all beaches similar to Cannon Beach in Oregon. 254 Or. at 595. Thus, no briefing on the propriety of the doctrine's application was before the Thornton court or before any other appellate court until this case.

This fact is significant in light of this Court's holding in Lucas v. South Carolina Coastal Council, supra, that decrees or legislation that mandate a

permanent physical occupation or denies all economic use of property "\* \* \* must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already in place upon land ownership." 505 U.S. \_\_\_\_, 112 S.Ct. at 2900, 120 L.Ed.2d at 821. And: "\* \* \* A 'State by ipse dixit may not transform private property into public property without compensation \* \* \*.' Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980)." 505 U.S. at p. \_\_\_\_, 112 S.Ct. at p. 2901, 120 L.Ed.2d at p. 823.

1. **Thornton, as interpreted by the court below, strips Petitioners and others similarly situated of their property without just compensation.**

The historical facts affecting the land in question and Oregon's legal history make application of the ancient custom doctrine's

element of antiquity extremely problematic. The doctrine could not apply to the land prior to the governmental patent issuance in 1893 and by 1917 the Petitioner's predecessors had constructed a seawall on the dry sand south of the property in question and in 1939 extended it, encompassing dry sand adjacent to the property in question -- all without challenge by the state or any private person (Vol. II, App. G, pp. 105-106, 109-10). Had there been in 1917 or 1939 a "background principle" of recreational servitude based upon ancient custom, that principal would surely have galvanized the state into filing an injunction suit against the initial seawall construction in 1917 or its

extension in 1939.<sup>5</sup>

Other historical facts make the application of custom as enunciated in Thornton, even more problematic. Following the passage of the Beach Act in 1967, the state permitted motel construction on the dry sands of Oregon at the Inn at Spanish Head and Driftwood Shores. (Vol. II, App. G, p. 89.) In addition, in 1992, a restaurant was built upon the dry sands of Lincoln Beach without state interference. When told of these facts and shown pictures of two of the improvements on dry sand, the high court rejected the references to actual dry sand development as not being in the

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<sup>5</sup>In fact, prior to 1967 (the date of the enactment of the Oregon Beach Bill (Vol. I, App. E, p. 34), no Oregon statute or decree had ever claimed any title or right of any kind to any portion of the beaches except the wet sand, i.e., the land between low, low tide and mean high tide. And, by 1947, 47% of the tide lands or wet sands had been conveyed by the state to private owners. (Vol. II, App. G. pp. 99-100.)

complaint. (Vol. II, App. I, pp. 185-190, transcript of oral argument before the Oregon Supreme Court.)<sup>6</sup>

The court below did not avail itself of the "legislative facts" that post-Beach Act development has occurred on Oregon's dry sand beaches<sup>7</sup> and did not advert to those

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<sup>6</sup>The Court obviously forgot that the Rule 21(A)(8) Motion to Dismiss a Complaint for failing to state a cause of action, prohibits evidentiary affidavits and exhibits in support of a complaint under Oregon's Rules of Civil Procedure, supra, p. 4 ftn. 2. Thus, the briefs before the trial court, Court of Appeals, and Oregon Supreme Court, of necessity, had to rely upon "legislative" facts being incorporated into the "Brandies briefs" before the courts.

<sup>7</sup>Appellate courts properly take judicial notice of legislative facts of common knowledge, and of facts not necessarily of common knowledge but verifiable, to the same extent as trial courts in arriving at informed policy judgments. Jay Burns Bakery Co. v. Bryan, 264 U.S. 504, 517, 44 S.Ct. 412, 420, 68 L.Ed. 813, 835 (1924); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35, L.Ed.2d 147 (1973). See also K Davis Administrative Law Treatise 2nd Ed § 15.5 (1980); Kirkpatrick: Oregon Evidence, 2nd Ed. § 201(a) (1989).

facts in its opinion, except to note at footnote 8 that the facts were not adjudicated facts. Vol. I, App. A, p. 5.

A further difficulty of Thornton's imposition of the doctrine of ancient custom, giving the public an unlimited right of recreational use on dry sand beaches, is the Oregon Beach Act itself. The Beach Act's constitutionality was based upon the public's ancient use of the beach, but the Beach Act itself restricts that unlimited right of user by providing explicitly that development can occur on the dry sand, subject to state regulation. See Beach Act, § 390.640 et. seq., Vol. I, App. E, pp. 37-41. Further support that the Oregon Legislature in 1969 intended that authorized development should occur on the dry sand is

ORS 307.450<sup>8</sup> which provides that, as of 1970, dry sand would not be taxed, only improvements constructed thereon. Thornton's bar of all development, as interpreted by the Oregon Supreme Court, impliedly repeals the Beach Act's development component: ORS 390.640 et seq. It further nullifies the prospective tax on later improvements, as those improvements are now barred, ostensibly since 1969.

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<sup>8</sup>ORS 307.450:

**" Certain beach lands.** After December 31, 1969, the land, but not the improvements to the land within the area described by ORS 390.770, is exempt from taxation."

Finally, three years after Thornton, the Oregon Legislature passed ORS 105.677<sup>9</sup>

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<sup>9</sup>ORS 105.677 states:

**"Permissive recreational use of land does not create an easement; preservation of preexisting public rights.**

"(1) An owner of land who either directly or indirectly invites or permits any person to use the land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of the land for any recreational purpose without the consent of the owner.

"(2) The fact that an owner of land allows the public to recreationally use the land without posting or fencing or otherwise restricting use of the land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public the right to continued use of said land.

"(3) Nothing in this section shall be construed to diminish or divert any public right acquired by dedication, prescription, grant, custom or otherwise existing before October 5, 1973."

to restrict Thornton's easement by custom to the dry sand beaches of Oregon, thereby clearly indicating a public policy that "easements by custom" would never be used to transform other private lands into public playgrounds, but codifying the recreational servitude upon Oregon's privately owned beaches.

These legislative facts and legal arguments were ignored in the Court of Appeals and Oregon Supreme Court's opinions.

2. **The sole purpose of applying, by ipse dixit, a recreational easement based upon ancient custom to Oregon's beaches is to avoid tract-by-tract litigation.**

Aside from the questionable propriety of applying the doctrine of ancient custom to the facts of Thornton or other similarly situated property, the critical issue is the avowed purpose of its application. That purpose was to bind all private beach

property so as to avoid property owners ever contesting the application of the doctrine to their private property in tract-by-tract litigation. Thornton, Id at p. 495. That blanket coverage of all privately owned dry sand beaches with an unlimited recreational servitude cannot withstand constitutional scrutiny under the jurisprudence of "takings," nor "procedural due process," nor "equal protection of the law" in the face of Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and especially Lucas v. South Carolina Coastal Commission, supra.

In Kaiser Aetna v. United States, supra, this Court held:

"In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, [footnote omitted] falls within this category of interests that the Government cannot take without compensation." 444 U.S. at 179-180, 100 S.Ct. at 393, 62 L.Ed2d at 346.

In Loretto v. Teleprompter Manhattan CATV Corp., supra, this Court held that where governmental action results in a permanent physical occupation of the property by the government or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at pp. 434-435, 102 S.Ct. at 3175, 73 L.Ed.2d 882.

In Nollan v. California Coastal Comm'n, supra, this Court held that a "permanent, physical occupancy" has occurred where individuals are given a permanent and

continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. 43 U.S. at 831-832, 107 S.Ct. at p. 3145, 97 L.Ed.2d at 685-686.

Thus, there can be no question that a fundamental property right is extinguished by Thornton as to all privately held dry sand beaches in Oregon without any prior precedent in the state backgrounding a principle of "easement by custom." In response to the argument the court stated:

"Thornton merely enunciated one of Oregon's 'background principles of \* \* \* the law of property.' Lucas, supra, 120 L.Ed.2d at 821." 317 Or. at p. 143.

In support thereof, the court cited Hay v. Bruno, 344 F. Supp. 286 (D. Or. 1972). In Hay v. Bruno, supra, plaintiff Hay argued that Thornton's legal reasoning was

erroneous and not reasonably predictable and should be overturned based upon Justice Stewart's language in his concurring opinion in Hughes v. State of Washington, supra,<sup>10</sup>. Hay v. Bruno did not state that the Thornton decision, adopting easement by custom, enunciated a background principle of real estate law. It merely stated:

"There was no unpredictable result here. The action of the Supreme Court of Oregon was consistent

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<sup>10</sup>"To the extent that the decision of the Supreme Court of Washington on that issue [rights to accretion] arguably conforms to reasonable expectations, we must, of course accept it as conclusive. But to the extent that it constitutes a sudden change in the state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." 389 U.S. at pp. 296-297, 88 S.Ct. at p. 442.

with and is supported by a number of decisions from other jurisdictions which confirm the right of a state under similar circumstances to protect and preserve its beaches for the benefit of the people. See, Marks v. Whitney, 6 Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971)." 344 F.Supp. at p. 289. (Emphasis added)

Marks v. Whitney was a California case upholding the State's interest in tidelands, not dry sand, based upon the doctrine of public trust.

The State Supreme Court below has now extended the full effect of Thornton to a petitioner challenging such extension as a taking. Petitioners rely on the holding in Lucas, supra, that the right to exclude must have been founded in Oregon's law of real property prior to 1957, when Petitioners acquired the property in question. In 1957, and prior thereto, there was no judicial or legislative basis for one to contend that

the state or a private person could enjoin the improvement of the property. Therefore, Thornton's latter transformation of the owner's fundamental right to the exclusive use of property into a permanent public physical occupancy, based on the theory of easement by custom, directly violates the holding in Lucas.

3. The public's recreational use of private property prior to an owners' attempted exclusive use does not satisfy the Lucas requirement that the State's law of property must protect the public use prior to a prohibition of an owners exclusive occupancy thereof.

In response to Petitioners' briefs and oral arguments that Oregon's law did not recognize a public recreational easement based upon custom, the Oregon Court of Appeals and Oregon Supreme Court reiterated the Thornton language that the public had used the land for recreation for various

times long enough to satisfy the doctrine of custom.

The longevity of the public's use of the beach is not the issue! The issue is the existence of Oregon's prior rule of real property law that public use of private land creates a recreational easement by custom retroactively binding upon all owners of such affected property. No one can honestly argue that such a rule backgrounded principals of Oregon's common law of real property prior to 1969 and Thornton. In fact, Oregon's common law precludes easements by prescription if user was permissive or by acquiescence. Lethin v. United States, 583 F. Supp. 863 (D.C. Or. 1984); Anderson v. McCormick, 18 Or. 301, 22 P. 1002 (1889).

The dismissal of plaintiff's Complaint for failing to state a cause of action on the ground that the right to exclude was

extinguished by ipse dixit in Thornton, decided twelve years after Petitioners acquired clear title, is in stark contradiction of this Court's rule laid down in Lucas.

**C. OREGON LAW OF PROPERTY APPLIED TO PETITIONERS AND OTHERS SIMILARLY SITUATED DENIES THEM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW.**

**1. Dismissal of Petitioners' Complaint deprived them of procedural due process.**

The procedural due process question was first raised in Petitioners' first brief to the Oregon Court of Appeals: Vol. II, App. G, pp. 90-93, and in Petitioners' Petition for Review at Vol. II, App. H, pp. 154-165, and again in oral argument before the Supreme Court at Vol. II, App. I, p. 210.

The equal protection of state law issue was raised in Petitioners' Petition for Review (App. H, pp. 173-174).

Thornton has been criticized if read to apply to all dry sand beaches as the Oregon Supreme Court has now done. One commentator observed: "The argument can be made that the holding violates proper procedure since other property owners were not before the court to litigate their rights. [Citing Schwartz, The Rights of Property, § 268-69.]" Delo, The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, 4 Environmental Law Rev. 383 at 408 (1974). In Public Access to Beaches, 22 Stanford Law Rev. 565 (1970) the author stated:

"If read broadly, the [Thornton] decision may be an unconstitutional deprivation of the property rights of littoral owners. To declare ex parte a new public right absent any evidence to support it and without giving the owners with whose property interest that public right conflicts a chance to be heard is to violate fundamental due process principles." Id. at 585.

The avowed purpose of the Thornton court's substitution of a recreational easement based upon ancient custom was to avoid tract-by-tract litigation by owners. While Oregon's Constitution does not have a due process clause, State v. Hart, 299 Or. 128, 140, 699 P.2d 1113 (1985); Linde, Without Due Process, 49 Oregon Law Review 125, 136-37 (1970), the Petitioners, and similarly situated owners of dry sand, are entitled to procedural due process under the Fifth and Fourteenth Amendments to the Constitution. When a fundamental property

right, i.e., the right to exclude the public is extinguished, the affected owners must be given some opportunity to be heard. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed 865 (1950) and United States v. State of Oregon, 295 U.S. 1, 12, 55 S.Ct. 610, 79 L.Ed 1267, 1273 (1934).

Justice Denecke, in his concurring opinion in Thornton, was obviously aware of the due process difficulty when he suggested an evidentiary formula that included "(1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach; . . ." and "(3) long and universal acquiesce by the upland owners in such public use; . . ." 254 Or. at p. 600. His suggestion regarding adjudication of the elements before the recreational easement is imposed upon other owners fell on deaf ears.

Some commentators have speculated that the Oregon Supreme Court may have heeded Justice Denecke's due process concern in the latter case of McDonald v. Halvorson, 308 Or. 340, 780 P.2d 714 (1989), at least as to the requirement that a citizen or state contending continuous public use must prove it.<sup>11</sup> The McDonald court stated:

"[Thornton] \* \* \* applied to [fine sand, coarse pebbles, or solid rock] \* \* \* if they abut the ocean and if their public use has been consistent with the doctrine of custom as explained in [Thornton]; otherwise, other rules of law will apply." Id. at pp. 359-60.

However, in this case, in 1993, the Oregon Supreme Court, again quoting snippets of phrases from Thornton, held:

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<sup>11</sup>Pitts, The Public Trust, 22 Environmental Law Review 731, 736-39 (1992); Clayton, Note, Oregon's New Doctrine of Custom: McDonald v. Halvorson, 26 Willamette Law Review 787, 802-08 (1990) and Long, Note, [McDonald v. Halvorson] Oregon's Beach Bill Revisited, 20 Environmental Law Review 1001 (1990).

"When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired, because public use of dry sand areas 'is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed.' Thornton, supra, 254 Or. at 598. See also State Highway v. Fultz, supra, 261 Or. at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the restrictions that background principles of the State's law of property \* \* \* all ready place [sic] upon land ownership. Lucas, supra, 120 L.Ed.2d at p. 821." 317 Or. 131 at p. 143. Vol. I, App. A, p. 12. (Emphasis added.)

Thus, the Thornton "presumption" of "easement by custom" overcomes Petitioners' historical and legal analysis showing the impropriety of applying custom to the land in question presented to the trial court, the Court of Appeals and the Oregon Supreme Court. (See pages 21-30, supra.)

Petitioners and other dry sand owners have no right to protect their fundamental property interest of exclusive possession in Oregon, whereas, James Nollan, in Nollan v. California Coastal Commission, supra, is vindicated in his property right in California and Stella Hughes, of Washington is vindicated in her property rights in Hughes v. State of Washington, supra. Petitioners cannot even obtain a trial. Petitioners' due process rights have effectively been denied.

2. The imposition of the public recreational easement and its inconsistent enforcement deprives Petitioners of equal protection of state law.

As stated earlier (infra pp. 25-27), Petitioners submitted "legislative facts" to the trial court, the Court of Appeals, and the Oregon Supreme Court, that the State has

allowed buildings on the dry sand beaches of Oregon after 1967 (date of the Beach Act), despite the attorney general's argument that Thornton precluded all such development. The three instances of construction on the dry sand, one as recent as 1992, demonstrates one of two conditions in the state of Oregon: (a) Thornton v. Hay does not bar such construction; or (b) Thornton bars such construction, but state and local agencies can inconsistently choose to obey Thornton's proscription or, in their unbridled discretion, ignore Thornton and allow construction on the dry sands of Oregon. The latter condition prevails in Oregon and the state fails to apply the law equally to owners of dry sand, in violation of the Petitioners' right to equal application and enforcement of the law. See Schwartz v. Hudacs, 566 NYS.2d 435, 149 Misc.2d 1024 (1990).

A separate denial of uniform application of Oregon's property law arises by the unconstitutional restriction of the application of the public recreational easement by custom to Oregon's dry sand beaches, but excluding the application of the doctrine from all other riparian land. Thornton limited itself to a sua sponte application of the recreational easement by custom to Oregon's dry sand beaches.

In 1973, four years after Thornton, the Oregon legislature passed ORS 105.677 (supra p. 28, fn. 9) which statutorily confirmed Thornton's creation of the recreational easement by custom on Oregon's beaches, but also strictly limited the doctrine to those beaches and excluded its application to all other private land. Clearly, Indians, settlers, and the state's citizens have traveled along, fished from, and recreated upon trails on the banks of Oregon's myriad

rivers and streams, yet private riparian owners are not subject to a similar commercial-recreational servitude by custom upon their stream bank property. Only dry sand beach owners suffer such a fundamental denial of their property rights. ORS 105.677 singles out Petitioners, and similarly situated beach front owners, from all other riparian owners in Oregon to unfairly bear a unique burden denying them exclusive use of their property where equally strong evidence of long term recreational use and, even stronger evidence of commercial use, of trails along rivers and streams exist, but owners of the property fronting on the high water mark of the rivers and streams are free from the burden. The distinction is irrational and also deprives Petitioners of equal

protection of the law. The City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

#### CONCLUSION

However great the public benefit is of Thornton's rule of recreational easement on Oregon's beaches by ancient custom, that rule transformed the Petitioners' prior fundamental right of exclusive use into a permanent physical occupation of Petitioners' dry sand by ipsi dixit contrary to Nollan and Lucas. The court below did not objectively and reasonably apply relevant precedents of Oregon law existing prior to Thornton in its analysis of that decision's present day validity.

The Thornton decision is contradicted by the Federal Common Law enunciated by this court in Hughes v. State of Washington, supra and Summa v. California, supra.

Thornton and ORS 105.677's retroactive application denies Petitioners, and similarly situated owners of beach land in Oregon, due process and equal protection of state law guaranteed by the Fifth and Fourteen Amendments.

Respectfully submitted this \_\_\_\_\_ day of September, 1993.

GARRY P. McMURRY & ASSOCIATES

By: \_\_\_\_\_

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No. 93-

Supreme Court, U.S.  
FILED

SEP 27 1993

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**In the Supreme Court  
of the United States**

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
OREGON, by and through its Department  
of Parks and Recreation,

Respondents.

**VOLUME I  
APPENDIX TO PETITION FOR WRIT  
OF CERTIORARI TO SUPREME COURT  
OF THE STATE OF OREGON**

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IN THE SUPREME COURT OF THE  
STATE OF OREGON

Irving C. and Jeanette STEVENS,  
*Petitioners on Review,*

*v.*

CITY OF CANNON BEACH  
and State of Oregon,  
Department of Parks & Recreation,  
*Respondents on Review.*

(CC 90-2061; CA A68916; SC S39585)

In Banc

On review from the Court of Appeals.\*

Argued and submitted March 3, 1993.

Garry P. McMurry, of Garry P. McMurry & Associates, Portland, argued the cause and filed the petition for petitioners on review.

Michael D. Reynolds, Assistant Attorney General, Salem, argued the cause for respondents on review State of Oregon, Department of Parks and Recreation. With him on the response were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General. With Jack L. Landau, Deputy Attorney General, on a response were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for respondent on review City of Cannon Beach.

Keith A. Bartholomew, Portland, filed a brief for *amici curiae* 1000 Friends of Oregon, League of Women Voters of Oregon, and Oregon Shores Conservation Coalition.

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

\* Appeal from Clatsop County Circuit Court, Thomas E. Edison, Judge. 114 Or App 457, 835 P2d 940 (1992).

### VAN HOOMISSEN, J.

Plaintiffs appeal a trial court's judgment dismissing their complaint for inverse condemnation for failure to state a claim. ORCP 21A(8). Plaintiffs own two vacant lots in the dry sand area of the City of Cannon Beach (city).<sup>1</sup> They applied to defendants city and Oregon Department of Parks and Recreation (department) for permits to build a seawall as part of the eventual development of the lots for motel or hotel use. City and department denied the application on a number of grounds.

Plaintiffs then brought this inverse condemnation action, alleging that defendants' denials, and the ordinances and rules on which they were based, resulted in a taking of plaintiffs' property, in violation of Article I, section 18, of the Oregon Constitution, and the Fifth Amendment of the United States Constitution. Defendants moved to dismiss plaintiffs' complaint, pursuant to ORCP 21A(8). Relying on *State ex rel Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969) (*Thornton*), the trial court allowed defendants' motions. The Court of Appeals affirmed. *Stevens v. City of Cannon Beach*, 114 Or App 457, 835 P2d 946 (1992). For the reasons that follow, we affirm the decision of the Court of Appeals.

Plaintiffs are the owners of two vacant ocean front lots in Cannon Beach, which have been improved by construction of streets and provision of utilities. Although the lots are zoned for residential or motel use, parts of them are subject to city's Active Dune and Beach Overlay zone. That zoning implements a portion of the Land Conservation and Development Commission's (LCDC) Statewide Goal 18, which limits "residential developments and commercial and industrial buildings on beaches, and on active foredunes, and other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping." Zoning Ordinance of Cannon Beach 79-4A, § 3.180. Parts of plaintiffs' lots also are within the dry sand area of the beach, as defined by

<sup>1</sup> For the purposes of this case, we will refer to the land below the ordinary high tide line as the "wet sand area" and the land above the ordinary high tide line but below the vegetation line as the "dry sand area." The disputed land at issue in this case is dry sand area.

the Oregon Beach Bill (Beach Bill). ORS 390.605 *et seq.*<sup>2</sup> Any person who wants to make an improvement on any property subject to ORS 390.640 must obtain a permit from the department. ORS 390.650.

Plaintiffs applied to city for a conditional use permit to build the seawall. City denied plaintiffs' application, in part because city found that the eventual proposed commercial use of the property conflicted with LCDC Goal 18.<sup>3</sup> Plaintiffs also applied to department for a permit to build the seawall within the dry sand area of the beach. ORS 390.650. That permit also was denied.<sup>4</sup>

<sup>2</sup> ORS 390.605 provides in part:

"As used in ORS 390.610 \* \* \*:

"\* \* \* \* \*

"(2) 'Ocean shore' means the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described in ORS 390.770."

ORS 390.615 provides:

"Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law."

<sup>3</sup> Plaintiffs' application to city also failed to satisfy a number of criteria for a conditional use permit. City's findings of fact state: that the design of the proposed seawall was not based on findings of a geologic site investigation, as required by city's comprehensive plan; that the proposed seawall conflicted with Flood Hazard Policy 3, because the calculated 100-year velocity flood would overtop the proposed seawall by 4.9 feet, which could result in damage to structures located behind the seawall; and that plaintiffs had failed to demonstrate that other higher-priority methods of erosion control (such as maintenance or planting of vegetation) would not be effective to stabilize the shoreline and that therefore the seawall (the lowest priority stabilization method) was required.

<sup>4</sup> Plaintiffs' application to department also failed to satisfy a number of criteria for a permit. Department's findings of fact state: that plaintiffs had not demonstrated erosion in the area that required a new seawall; that they had not demonstrated the need for new motel units in the city; that they had failed to obtain the permit required by ORS 196.810 for fill removal; that the proposed seawall would obstruct the view; that the seawall would remove 12,500 feet of dry sand area used extensively for public recreation; that recreational access would be impaired; that the seawall would present an escape route obstacle to beach users (particularly to senior citizens and others whose mobility is impaired); that neighboring property and land in front of the seawall could be subject to accelerated erosion; and that the proposed design did not protect on-shore property from wave overtopping and the 100-year flood.

Plaintiffs then brought this inverse condemnation action against defendants, alleging that city's denial of a permit is a taking of private property for a public purpose, in violation of Article I, section 18,<sup>5</sup> and the Fifth Amendment (an "as applied" taking), and that city's Zoning Ordinance 79-4A, implementing LCDC Goal 18, on its face, is an unconstitutional taking of private property for a public purpose ("facial" taking).<sup>6</sup>

Plaintiffs further alleged that department's denial of a permit is an unconstitutional "as applied" taking of their property and that department's rules implementing LCDC Goal 18 are an unconstitutional "facial" taking. Plaintiffs also claimed that compliance with other technical requirements for the proposed seawall could not result in the award of the permits and that, therefore, they had pursued all available means of relief with defendants.

Defendants filed ORCP 21A(8) motions to dismiss against plaintiffs' complaint, arguing that plaintiffs' takings allegations failed to state ultimate facts sufficient to constitute claims. The trial court granted defendants' motions with prejudice, citing *Thornton, supra*. The court explained that defendants' denials took nothing from plaintiffs, because plaintiffs' property interests in the lots never have included development rights that could interfere with the public's use of the dry sand area.<sup>7</sup> Accordingly, the court entered judgment for defendants.

In the Court of Appeals, plaintiffs argued that the trial court erred in holding that *Thornton* precluded any development of the dry sand area of their property. The Court

<sup>5</sup> Because plaintiffs have not made a separate argument under the state constitution, we will assume for purposes of this case, without deciding, that the analysis would be the same under the Oregon Constitution. See *Dept. of Trans. v. Lundberg*, 312 Or 568, 572, 572 n 4, 825 P2d 641 (1992) (stating principle).

<sup>6</sup> See Annot, *Supreme Court's View As To What Constitutes "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation*, 89 L Ed 2d 977 (1988).

<sup>7</sup> Plaintiffs then voluntarily dismissed without prejudice a final claim for *de novo* review of department's denial of the permit. ORS 390.658 provides in part:

"Any person aggrieved by the decision of the State Parks and Recreation Department under ORS 390.650 is entitled to petition the circuit court of the county where the property is located for a judicial review, *de novo* as in equity, of the action or failure to act by the department."

of Appeals disagreed and affirmed, quoting *Thornton*:

"The disputed area [dry sand area] is *sui generis*. While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple." \* \* \*

" \* \* \* \* \*

"The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his." 254 Or at 591, 599." *Stevens v. City of Cannon Beach, supra*, 114 Or App at 459-60.

The court also noted that the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council*, 505 US \_\_\_, 112 S Ct 2886, 120 L Ed 2d 798 (1992) (*Lucas*) did not require a different result. *Ibid*. Accordingly, the court concluded that the trial court did not err in dismissing plaintiffs' taking claims.

On review,<sup>8</sup> plaintiffs argue that the Court of Appeals' decision in this case conflicts with the recent decision of the Supreme Court of the United States in *Lucas v. South Carolina Coastal Council, supra*. Plaintiffs further argue that, because they acquired their property before this court's 1969 decision in *Thornton*, the rule from *Thornton* may not be applied retroactively to them.<sup>9</sup> Finally, plaintiffs argue that the trial court and the Court of Appeals incorrectly interpreted *Thornton* as having superseded and canceled *all* development rights of private owners on the dry sand area of city, thus impliedly repealing the provisions of the Beach Bill that allow *some* development.<sup>10</sup> Plaintiffs do not ask this

<sup>8</sup> During oral argument in this court, plaintiffs asked this court to take judicial notice of three instances where, according to plaintiffs, dry sand areas within the state of Oregon have been developed. We decline to do so. Under the Oregon Evidence Code, a court may take judicial notice of an adjudicative fact if it is generally known within the jurisdiction or if it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OEC 201(b). Plaintiffs' proposed facts fit neither of those categories.

<sup>9</sup> The date of the *Thornton* decision is not relevant. Rather, the question is when, under *Thornton's* reasoning, the public rights came into being. The answer is that they came into being long before plaintiffs acquired any interests in their land.

<sup>10</sup> Plaintiffs make several other assignments of error, most of which are subsumed by our framing of the main issue in this case. The others do not merit discussion.

court to overrule *Thornton*, and they do not argue that any portion of the Beach Bill is unconstitutional.

Defendants respond that, because *Lucas* holds that where the state seeks to sustain regulation that deprives land of all economically beneficial use, the state may resist compensation if the "proscribed use interests" were not part of the owner's title to begin with, *Lucas, supra*, 120 L Ed 2d at 820, *Lucas* comports with *Thornton*. Defendants argue that, because under the state property law doctrine of custom, the proscribed use interests in this case were not part of plaintiffs' title, there is no taking under *Lucas*.

Defendants further respond that, if the rule from *Thornton* could not be applied where the customary use by the public interfered with any economically beneficial uses by the dry sand area owners, *Thornton* would be severely limited. *Thornton*, defendants argue, did not create a new legal principle, but merely applied an existing legal principle of easement by custom grounded in Oregon's property law. Therefore, defendants argue, application of *Thornton* in the present case is not retroactive, any more than it was in *Thornton*. See *Hay v. Bruno*, 344 F Supp 286, 289 (D Or 1972) (rejecting argument that Oregon Supreme Court's decision in *Thornton* was a sudden change in state property law that therefore effected a taking of the property at issue in *Thornton*).

*Amici curiae* 1000 Friends of Oregon, the League of Women Voters of Oregon, and the Oregon Shores Conservation Coalition have submitted briefs on behalf of defendants, at both trial and appellate levels in this case. They argue that *Lucas* does not apply to the present case, because the regulations in question do not prevent "all economically beneficial use" of plaintiffs' property.<sup>11</sup>

<sup>11</sup> *Amici curiae* also set forth an interesting alternative analysis of this case, arguing that the public trust doctrine may provide a common-law source of protection of Oregon's beaches for use by the public. The public trust doctrine analysis, more in line with the specially concurring opinion of Justice Denecke in *Thornton*, has been followed in several jurisdictions. See, e.g., *Matthews v. Bay Head Imp. Assn.*, 95 NJ 306, 471 A2d 355, cert den 469 US 821 (1984) (privately owned dry sand areas come under the umbrella of the public trust); *National Audubon Soc. v. Superior Court*, 33 Cal 3d 419, 189 Cal Rptr 346, 658 P2d 709, cert den 464 US 977 (1983) (landowners who purchase property subject to public trust do not state takings claims); see also Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued*

The parties recognize, and we agree, that *Thornton* is directly on point. The issue, therefore, is the viability of *Thornton*'s rule of law in the light of *Lucas*. We therefore begin with a discussion of *Thornton*.

The facts in this case and in *Thornton* are remarkably similar. In each case, the landowners wished to enclose the dry sand area of their Cannon Beach properties, thereby excluding the public from that portion of the ocean shore. In *Thornton*, this court held that the state could prevent such enclosures because, throughout Oregon's history, the dry sand area customarily had been used by the public:

"The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.

"Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures." *Thornton, supra*, 254 Or at 588-89.

In *Thornton*, while noting that the common law of prescriptive easements also could apply, *id.* at 593-95, this court relied instead on the common law doctrine of custom to support its holding that the landowners could be prevented from excluding the public from the dry sand areas of the

*Public Use of Oregon Beaches*, 22 Env't'l L 731 (1992). Because of our disposition of this case on other grounds, we do not reach this argument.

ocean shore:

"The most cogent basis for the decision in this case is the English doctrine of custom. \* \* \* An established custom \* \* \* can be proven with reference to a larger region [than could a prescriptive easement]. \* \* \*

"The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.

"\* \* \* \* \*

"Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton*, *supra*, 254 Or at 595, 598.

See also *McDonald v. Halvorson*, 308 Or 340, 780 P2d 714 (1989) (because no factual predicate shown for application of doctrine of custom, general public had no right to access or to use private inland dry sand area); *State Highway v. Fultz*, 261 Or 289, 491 P2d 1171 (1971) (public has used dry sand area between ordinary high tide and vegetation line for recreational purposes since 1889).

As defined in *Thornton*, the common-law doctrine of custom may be paraphrased as follows:

- (1) The land has been used in this manner so long "that the memory of man runneth not to the contrary";
- (2) without interruption;
- (3) peaceably;
- (4) the public use has been appropriate to the land and the usages of the community;
- (5) the boundary is certain;

(6) the custom is obligatory, *i.e.*, it is not left up to individual landowners as to whether they will recognize the public's right to access; and

(7) the custom is not repugnant or inconsistent with other customs or laws. *Thornton*, *supra*, 254 Or at 595-97, (citing Blackstone's Commentaries).

In *Thornton*, this court determined that the historic public use of the dry sand area of Cannon Beach met those requirements.<sup>12</sup> *Thornton*, *supra*, 254 Or at 596-97; 1 William Blackstone Commentaries 76-78 (1778). See also *McDonald v. Halvorsen*, *supra*, 308 Or at 359-60 (Oregon common-law doctrine of custom as stated in *Thornton* applies to classic dry

<sup>12</sup> There is no evidence that the native peoples recognized private ownership of the beach area at the time Europeans first appeared on the scene. Indeed, there was no sovereign who could have granted, enforced, or confirmed any private property rights in the beach areas for many years after the first Europeans arrived. The law of a common area, accessible and usable by all, called "custom," was itself a common part of the legal system accompanying European settlers into the Pacific Northwest. About 1819, the United States and Great Britain agreed to postpone for 20 years settlement of the question of which was sovereign in the Pacific Northwest. Settlement was made by treaty in 1846. See Merk, *The Oregon Question* (1967); Gallatin, *The Oregon Question* (1846); Twiss, *The Oregon Question Examined* (1846); Falconer, *The Oregon Question* (1845); Sturgis, *The Oregon Question* (1845). In the interim, various franchised private companies of Great Britain may have maintained order of sorts, but themselves provided no source of law. For a brief period, settlers in the Willamette Valley formed an independent government. The Oregon Territory was organized in 1848, and Oregon became a state in 1859.

The early Oregon cases relating to this subject indicate that "the tide lands lying between high- and low-water mark belong to the state." *Bowlby v. Shively*, 22 Or 410, 419, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894), (citing *Parker v. Taylor*, 7 Or 446 (1879)). The Supreme Court's affirmance in that case stated:

"By the common law, both the title and the dominion of the sea \* \* \* where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature \* \* \*." *Shively v. Bowlby*, *supra*, 152 US at 11.

Although the early cases did not distinguish between dry sand and wet sand areas, this court has noted that the distinguishing line was considered to be "the 'high-water' line, a line that was then assumed to be the vegetation line." *Thornton*, *supra*, 254 Or at 589. It was not until 1935 that the United States Supreme Court redefined this boundary as extending to the mean high-tide line. *Borax Ltd. v. Los Angeles*, 296 US 10, 22-27, 56 S Ct 23, 80 L Ed 9 (1935). This court has noted that, although *Borax* "may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians \* \* \* [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners." *Thornton*, *supra*, 254 Or at 590.

sand areas abutting the ocean, such as Cannon Beach, but not to inland, freshwater cove with no history of customary use by public); Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 Env't'l L 731, 737 n 40 (1992) (noting other jurisdictions that have adopted the common-law doctrine of custom). We now turn to the determination of what effect the Supreme Court's opinion in *Lucas* has on Oregon's well-established policy of public access to and protection of its ocean shores, as articulated in *Thornton* and the cases following it.

In *Lucas*, the plaintiff purchased two beachfront lots in 1986, for about \$1 million, intending to build single-family homes, for which the land was zoned at that time. In 1988, South Carolina passed a Beachfront Management Act, which, in effect, barred Lucas from constructing any habitable structures on the land. The state trial court found that the parcels therefore were rendered valueless by the Act. In *Lucas*, the Supreme Court recounted its regulatory takings jurisprudence, stating again that this area of the law defies clear and objective formulae for decision-making, except in cases of direct physical takings or non-physical takings that clearly deprive the owner of all economic use of the land. *Id.* 120 L Ed 2d at 812-15. The Court stated:

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; 'as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' " *Id.* (footnote omitted) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 US [393,] 413, 43 S Ct 158, 67 L Ed 322 (1922) (new statute that destroyed previously existing property rights was invalid as taking without compensation)).

The *Lucas* Court addressed a state's sudden elimination of all economically valuable use of land without compensation, holding that:

"Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.*, 120 L Ed 2d at 821 (emphasis added).

As an example, the Court explained that the owner of a lake bed would not be entitled to compensation if denied a permit to engage in landfilling if such an activity would have the effect of flooding another's land, even if the effect of the denial was to eliminate the only economically viable use of the land, because it would not have been "previously permissible under relevant property and nuisance principles." *Id.* at 821. Only when a regulation goes beyond what the relevant background principles of state law would dictate must compensation be paid. *Id.* at 822.

The *Lucas* Court then listed other factors to be considered in determining whether a taking has occurred, including: the degree of harm to public lands and resources posed by the owner's proposed activities; the degree of harm to adjacent private property; the social value and suitability of the owner's proposed activity; the ease with which the harm could be avoided; and the uses engaged in by similarly situated owners. *Ibid.* Having described this analysis, the majority remanded the case to the South Carolina courts for a determination under state law as to whether the ills sought to be avoided by the Beachfront Management Act would have been illegal under the common law of private or public nuisance, recognizing that it was unlikely that this would be the case. *Id.* at 822.

Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno*, *supra*, 344 F Supp at 289, "there was no

sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno, supra*; nor did *Thornton* create a new rule of law as applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of \* \* \* the law of property." *Lucas, supra*, 120 L Ed 2d at 821. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 598. See also *State Highway v. Fultz, supra*, 261 Or at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of "the restrictions that background principles of the State's law of property \* \* \* already place upon land ownership." *Lucas, supra*, 120 L Ed 2d at 821. We hold that plaintiffs have never had the property interests that they claim were taken by defendants' decision and regulations.

Plaintiffs, however, do not simply claim that the doctrine of custom is no longer viable after *Lucas*. They also claim that the various statutory schemes that serve to implement that doctrine are unconstitutional. We proceed to examine that claim.

In the years following the *Thornton* case, the Oregon Beach Bill was revised, and the comprehensive land use laws leading to the eventual implementation of LCDC Goal 18 at state and local levels were enacted. Those laws recognized and accommodated the common doctrine of customary use of Oregon's beaches. The Oregon Beach Bill provides in part:

"(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use

has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

"(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." ORS 390.610.

In order to implement that policy, the Beach Bill provides that a permit must be obtained for improvements to the ocean shore below the vegetation line (*i.e.*, within the dry sand area of the beach). ORS 390.640(1). An application for such a permit is made to department. After notice and a hearing, and after considering a number of factors, department may approve or deny the permit. ORS 390.650; ORS 390.655. Those factors include:

"(1) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

"(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

"(3) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses and improvements, the density of development and the property values in the area.

"(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area." ORS 390.655.

The standards used by department in issuing a permit are further defined in OAR 736-20-005 to OAR 736-20-030, and include:

"In accordance with the Statewide Land Conservation and Development Commission Goal #18 for Beaches and Dunes, permit applications for beachfront protective structures seaward of the beach zone line will be considered only where development existed on January 1, 1977. The proposed project will be evaluated against the applicable criteria included within Goal #18 and other appropriate statewide planning goals." OAR 736-20-010(6).<sup>13</sup>

LCDC Statewide Planning Goal 18 Implementation Requirements, relating to beaches and dunes, include the following:

"(2) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping \* \* \*. Other development in these areas shall be permitted only if the findings required in (1) above<sup>14</sup> are presented and it is demonstrated that the proposed development:

"a. Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and

"b. Is designed to minimize adverse environmental effects.

"\* \* \* \* \*

<sup>13</sup> Other considerations specified in OAR 736-20-005 to OAR 736-20-030 include project need, protection of public rights, compliance with other laws, project modification and other costs, scenic, recreational, and safety concerns, and concerns for other resources such as wildlife. Department made detailed findings regarding all of those considerations, all of which, except concerns for other resources such as wildlife, served as bases for denial of the permit. See note 4, *supra*.

<sup>14</sup> Those findings must include:

"a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;

"b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;

"c. Methods for protecting the surrounding area from any adverse effects of the development; and

"d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use." LCDC Statewide Planning Goal 18, Implementation Requirements.

The findings accompanying department's denials of plaintiffs' permits satisfy those criteria.

"(5) Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For purposes of this requirement \* \* \*, 'development' means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

"The criteria for review of all shore and beachfront protective structures shall provide that:

"a. visual impacts are minimized;

"b. necessary access to the beach is maintained;

"c. negative impacts on adjacent property are minimized; and

"d. long-term or recurring costs to the public are avoided."

Plaintiffs argue that LCDC Goal 18 itself, as implemented by city ordinance, and as relied on by department as one of the criteria that it used in considering whether a permit should be allowed, is unconstitutional, both facially and as applied to their land.

We first address whether the regulations at issue here constitute a facial taking of plaintiffs' land. Plaintiffs argue that, because it prohibits residential developments and commercial and industrial buildings on beaches, LCDC Goal 18 (as codified in both city's ordinance and department's regulations) constitutes a facial taking of their land. In *Dolan v. City of Tigard*, 317 Or 110, 118, \_\_\_ P2d \_\_\_ (1993), this court stated:

"A land-use regulation does not effect a 'taking' of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. *Nollan v. California Coastal Comm'n*, 483 US 825, 835-36, 107 S Ct 3141, 97 L Ed 2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Agins v. City of Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980)."

Plaintiffs here do not argue that defendants' denials and the authority on which they rely do not substantially advance a legitimate state interest.

The Supreme Court has stated that plaintiffs "face an uphill battle in making a facial attack on [a statute or regulation] as a taking." *Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 US at 495. In general, "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 294, 101 S Ct 2352, 69 L Ed 2d 1 (1981) (citations omitted).

"The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land \* \* \*'" *Id.* (quoting *Agins v. Tiburon*, 447 US 255, 295-96, 100 S Ct 2138, 65 L Ed 2d 106 (1980)).<sup>15</sup>

Plaintiffs argue that the regulation and ordinance deprive them of all economically viable use of their property. It is clear from LCDC Goal 18, however, as well as from the regulations and ordinances at issue here, that what is prohibited is "residential developments and commercial and industrial buildings." Not all economically viable uses of plaintiffs' property falls within that prohibition. Notably, in some circumstances, LCDC Goal 18's implementation requirements appear to allow for single-family dwellings. See, e.g., LCDC Goal 18, Implementation Requirement 4. Moreover, LCDC Goal 18, as well as the rules and ordinances, provides for development of beach front protective structures. Although Implementation Requirement 2, cited by plaintiffs, does prohibit residential developments and commercial and industrial buildings on beaches, Implementation Requirement 5 specifically *allows* beach front protective structures such as seawalls in some circumstances. The provisions of city's Comprehensive Plan and Zoning Ordinance 79-4A, as well as

<sup>15</sup> See *Agins v. Tiburon*, 447 US 255, 260-61, 100 S Ct 2138, 65 L Ed 2d 106 (1980) ("Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests").

department's administrative rules (OAR 736-20-005 to 736-20-020) comport with those implementation requirements. See notes 3, 4, *supra*. Because LCDC Goal 18 makes provisions for certain economically viable uses of private beaches and dunes, we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property.

Turning to plaintiffs' "as applied" challenges, we note that plaintiffs' focus in this case has been their inability to construct a *motel or hotel* on their lots. Implicit in their arguments is the assumption that that is the "economic use" that they have been denied. That assumption, however, is mistaken. Plaintiffs were not denied permits to construct a *motel or hotel* on their lots; rather, they were denied permits to construct a *seawall*. Plaintiffs do not contend that the seawall itself is a residential development or a commercial or industrial building prohibited by the ordinances and rules at issue here. We decline, therefore, to analyze plaintiffs' "as applied" taking claim *as if* a permit to build a motel or hotel had been denied under the LCDC Goal 18 criteria. That simply is not the case.

City's findings of fact state that "the area of the proposed seawall was 'developed' in January 1977. Therefore, beachfront protective structures, such as a seawall, may be permitted." Complaint, Exhibit 1, at 13; see LCDC Goal 18 Implementation Requirement 5, quoted *supra*. Thus, plaintiffs' attack on city's ordinances, at best, is indirect, because it is clear that in some circumstances seawalls may be permitted. Plaintiffs rely on city's findings of fact that the purpose of the proposed seawall is "to stabilize and protect private property and that after the construction of the seawall the property *may* be used for commercial purposes." Complaint, Exhibit 1, at 4 (emphasis added).

Only one of city's 14 findings of fact relates to the possible commercial use of the lots; it indicates that the purpose of the proposed seawall was not to minimize an erosion hazard but, rather, to facilitate commercial development in a manner inconsistent with the general prohibition on residential developments and commercial and industrial buildings on beaches. Neither city's findings nor its ordinances suggest that exceptions consistent with the provisions

of LCDC Goal 18 never would be allowed. City's findings show that plaintiffs failed to comply with 10 of city's 14 standards. Nine of those failures to comply were not directly concerned with the possible commercial use of the property. Thus, it is far from clear that meeting the "other technical objections" (as plaintiffs describe those numerous other criteria that their permit applications failed to meet) would not have resulted in city's approval of plaintiffs' conditional use permit to build a seawall.

Department's denial of the permit was based on numerous other criteria as well.<sup>16</sup> See note 4, *supra*. Plaintiffs do not argue that those criteria are unconstitutional. We conclude, therefore, that department's findings regarding the LCDC Goal 18 criteria, flawed though they were, did not necessarily cause the denial of the permit to build a seawall.

The purpose of LCDC Goal 18 is

"To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

"To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

Department's administrative rules and city's ordinances at issue in this case serve to mesh the purposes of the common law of custom, the Beach Bill, and LCDC Goal 18.

<sup>16</sup> The state's denial of the permits to build the seawall was premised on its findings that plaintiffs failed to meet the criteria set forth in OAR 736-20-005 through OAR 736-20-025. Only OAR 736-20-010(6) pertains to the requirements of LCDC Goal 18. In its finding pertaining to this subsection, however, the state erroneously found that no development existed on these lots before January 1, 1977. Complaint, Exhibit 2, at 9. This finding conflicts with city's finding in this regard, as well as the facts as stated in plaintiffs' complaint, which we take as true for purposes of this review. The lots in question were "developed" under the definition provided in LCDC Goal 18 Implementation Requirement 5, because they were "vacant subdivision lots which are physically improved through construction of streets and provision of utilities." We conclude that the state's finding was erroneous, but we are unable to conclude that the error was the reason for denial of the permit in the present case or that compliance with "technical objections" would have been futile.

Had plaintiffs pursued the remedy available for review of department's decision, that error could have been addressed. ORS 390.658. Plaintiffs, however, chose to dismiss their claim under that statute. The fact that review of this issue would have been available under ORS 390.658 certainly undermines plaintiffs' claim that pursuit of other remedies would have been futile.

Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because "the proscribed use interests" asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. *Lucas, supra*, 120 L Ed 2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an "as applied" challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. *Lucas, supra*.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Argued and submitted June 24, affirmed August 5, reconsideration denied September 23, petition for review allowed December 22, 1992 (315 Or 271)

See later issue Oregon Reports

Irving C. STEVENS  
and Jeanette Stevens,  
*Appellants,*

*v.*

CITY OF CANNON BEACH  
and State of Oregon,  
Department of Parks & Recreation,  
*Respondents.*

(90-2061; CA A68916)

835 P2d 940

Owners of vacant lots in dry sand area of city brought inverse condemnation action alleging that denial of application for permits to build sea wall constituted uncompensated taking. The Circuit Court, Thomas E. Edison, J., dismissed claims, and owners appealed. The Court of Appeals, Buttler, P. J., held that denial of applications took nothing from owners because their property interests never included development rights that could interfere with public's use of dry sand area.

Affirmed.

**Eminent Domain – Nature, extent, and delegation of power – What constitutes a taking; police and other powers distinguished – Relating to waters or water courses**

Denial of landowners' application for permits to build sea wall as part of eventual development of vacant lots in dry sand area of city for motel or hotel use was not uncompensated taking within meaning of Oregon or United States Constitutions; owners' property interests never included development rights that could interfere with public's use of dry sand area. Or Const, Art I, § 18; US Const, Amend V.

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CJS, Eminent Domain § 13.

Appeal from Circuit Court, Clatsop County.

Thomas E. Edison, Judge.

Garry P. McMurry, Portland, argued the cause for appellants. With him on the briefs was Garry P. McMurry & Assoc., Portland.

Jack L. Landau, Deputy Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

William R. Canessa and Campbell, Moberg & Canessa, P.C., Seaside, filed the brief for respondent City of Cannon Beach.

Keith A. Bartholomew, and Interns, Michael Clinton and Carrie Stilwell, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon, League of Women Voters of Oregon and Oregon Shores Conservation Coalition.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

BUTTLER, P. J.

Affirmed.

\*\*\*\*\*

"The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his." 254 Or at 591, 599.

See also *McDonald v. Halvorson*, 308 Or 340, 780 P2d 714 (1989).

In short, under the Supreme Court's decision in *Hay*, plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations. The question before *this* court, therefore, is necessarily very narrow. We must follow the Supreme Court's decision unless, as plaintiffs argue, that decision constitutes a taking in itself and is contrary to United States Supreme Court decisions applying the Takings Clause of the Fifth Amendment.

After oral arguments in this case, the United States Supreme Court decided *Lucas v. South Carolina Coastal Council*, 505 US \_\_\_, 112 S Ct 2886, 120 L Ed 2d 798 (1992). The Court said:

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."<sup>3</sup> 505 US at \_\_\_, 120 L Ed 2d at 820. (Footnote omitted.)

The opinion makes it clear that that issue is to be decided under the "State's law of property and nuisance." \_\_\_ US at \_\_\_, 120 L Ed 2d at 821.

*State ex rel Thornton v. Hay, supra*, is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions. The trial court did not err by dismissing the taking claims.

Given the basis for our holding, we do not reach the parties' other arguments.

Affirmed.

<sup>3</sup> We assume for purposes of discussion, but do not decide, that defendants' actions would deprive plaintiffs of all economically beneficial use of the lots.

THOMAS E. EDISON  
CIRCUIT JUDGE



P.O. Box 835  
TEL (503) 325-8555  
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*Circuit Court of Oregon*  
CLATSOP COUNTY COURTHOUSE  
ASTORIA, OREGON 97103

January 8, 1991

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RE: Stevens v. Cannon Beach, et al  
Clatsop County No. 90-2061

Gentlemen:

On October 31, 1990 this Court heard oral argument on defendant City of Cannon Beach's motions to dismiss plaintiff's first and second claims of the amended complaint herein and defendant State of

Oregon's motions to dismiss plaintiff's third and fourth claims and to strike certain matters from the prayer of the amended complaint pertaining to plaintiff's fifth claim.

At the time of the said oral argument I knew that I would be engaged during the entire month of November 1990, in holding court in other counties because of an aggravated murder case being prosecuted in this court and so would not be able to deal with this case until later. I therefore asked the court reporter to transcribe the oral arguments for my future reference in writing this opinion. Unfortunately, the court reporter met with severe health problems which have to date prevented her from transcribing that argument for such use. It is also apparent that we now must consider the provisions of UTCR 2.030 (1) which require trial courts to decide matters taken under advisement within sixty days. Therefore, this is not the opinion letter that I desired to write but the time limitations require an immediate ruling.

This is a suit brought on the theory of inverse condemnation wherein the plaintiffs contend that the local and state government defendants have taken their property rights without paying just compensation. The plaintiffs are owners of ocean front property in the City of Cannon Beach who desire to construct a seawall on the dry sand portion of the beach, and after backfilling, to construct a motel thereon. They made application for such construction both to the defendant City and to the Parks and Recreation Department of the defendant State. The applications

were denied. It is this denial which prevents them from developing their property that plaintiffs contend constitutes the wrongful taking of their property rights.

In deciding whether plaintiffs can proceed on this theory we must look for guidance, if available, in the decisions of our own appellate courts. It appears that the Oregon Supreme Court has settled this matter by its decision in State ex rel Thornton v. Hay, 254 Or 584 (1969). This case teaches us that ocean front owners cannot enclose or develop the dry sand beach area so as to exclude the public therefrom. The Court based this restriction on the common law doctrine of custom, that is, because of the public's ancient and continued use of the dry sand area on the Oregon coast that its future use thereof cannot be curtailed or limited. This means that land owners cannot build on the beach because to do so would deny the public's rights to access. Therefore, the defendant's denial of the applications for development took nothing from the plaintiffs since they never had such a right. The motions against the first four claims of the plaintiffs are therefore allowed and they are dismissed.

Concerning the motion to strike certain portions of the prayer of the complaint pertaining to plaintiffs fifth claim, I likewise agree with the contentions of the defendant State of Oregon and will allow that motion. ORS 390.658 cannot support a claim for an award of damages for inverse condemnation and an award of attorneys fees.

I recognize that the defendants have also raised contentions that the amended complaint does not adequately plead the elements of a takings claim and that such takings claims are not ripe for determination. In view of my decision that there was no taking as aforesaid, these issues are moot and no determination by this Court is necessary.

I will ask Mr. Landau and Mr. Canessa to draw and submit appropriate orders accordingly.

Very truly yours,

/s/ Thomas E. Edison

THOMAS E. EDISON  
Circuit Judge

TEE:st

# Oregon Admission Acts

(1991 EDITION)

## ACT OF CONGRESS ADMITTING OREGON INTO UNION

[Approved February 14, 1859]

**Preamble.** Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States; Therefore —

**Section 1. Announcement of admission; boundaries of state; jurisdiction of river cases.** That Oregon be, and she is hereby, received into the Union on an equal footing with the other States in all respects whatever, with the following boundaries: In order that the boundaries of the State may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows, to wit: Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the

State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla-Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel, to the middle of the main channel of the Shoshones or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State. [11 Stat. 383 (1859)]

**Section 2. Jurisdiction over waters forming boundary of state; use of navigable waters as free highways.** That the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said State as to all other citizens

of the United States, without any tax, duty, impost, or toll therefor. [11 Stat. 383 (1859)]

**Section 3. Representation in Congress.** That until the next census and apportionment of representatives, the State of Oregon shall be entitled to one representative in the Congress of the United States. [11 Stat. 383 (1859)]

**Section 4. Certain propositions offered to people of Oregon for acceptance or rejection.** That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third,

That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of

the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided,

however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act. [11 Stat. 383 (1859)]

**Note.** By section 20 of the Act of August 14, 1848, establishing a territorial government for Oregon, the sixteenth and thirty-sixth sections were reserved for school purposes.

**Section 5. Residue of Oregon Territory incorporated into Washington Territory.** That until Congress shall otherwise direct, the residue of the Territory of Oregon shall be, and is hereby, incorporated into, and made a part of the Territory of Washington. [11 Stat. 383 (1859)]

## ACCEPTANCE BY OREGON OF PROPOSITIONS OFFERED BY CONGRESS IN ADMISSION ACT

[Approved June 3, 1859]

Whereas, the Congress of the United States did pass an act, entitled "An Act for the admission of Oregon into the Union," approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the State of Oregon, in the words following: "§4. The following propositions be, and the same are hereby, offered to the said people of Oregon, for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State

for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is vested in an individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State, which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than

residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided, however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act." Therefore,

Section 1. Be it enacted by the Legislative Assembly of the State of Oregon, That the six propositions offered to the people of Oregon in the above-recited portion of the act of Congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

Be it ordained by the Legislative Assembly of the State of Oregon, That the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchaser thereof; and that in no case shall non-resident proprietors be taxed higher than residents. And that the said State shall never tax the lands or property of the United States within said State. [1859 (First extra session) p. 29]

## OCEAN SHORES; STATE RECREATION AREAS

### (General Provisions)

**390.605 "Improvement," "ocean shore," and "state recreation area" defined.** As used in ORS 390.610, 390.620 to 390.660, 390.690, and 390.705 to 390.770, unless the context requires otherwise:

(1) An "improvement" includes a structure, appurtenance or other addition, modification or alteration constructed, placed or made on or to the land.

(2) "Ocean shore" means the land lying between extreme low tide of the Pacific Ocean and the line of vegetation as established and described by ORS 390.770.

(3) "State recreation area" means a land or water area, or combination thereof, under the jurisdiction of the State Parks and Recreation Department used by the public for recreational purposes. [Formerly 274.065 and then 390.710; 1989 c.904 §23]

**390.610 Policy.** (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore legally existing over the ocean shore of the state from the Columbia River on the north to the Oregon-California line on the south so that the public may have the free and uninterrupted use thereof.

(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the public through

dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore. [1967 c.601 §§1, 2(1), (2), (3); 1969 c.601 §4]

**390.615 Ownership of Pacific shore; declaration as state recreation area.** Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law. [Formerly 274.070 and then 390.720]

**390.620 Pacific shore not to be alienated; judicial confirmation.** (1) No portion of the lands described by ORS 390.610 or any interest either therein now or hereafter acquired by the State of Oregon or any political subdivision thereof shall be alienated

except as expressly provided by state law. The State Parks and Recreation Department and the State Land Board shall have concurrent jurisdiction to undertake appropriate court proceedings, when necessary, to protect, settle and confirm all such public rights and easements in the State of Oregon.

(2) No portion of the ocean shore declared a state recreation area by ORS 390.610 shall be alienated by any of the agencies of the state except as provided by law.

(3) In carrying out its duties under subsection (1) of this section with respect to lands and interests in land within the ocean shore, the State Land Board shall act with respect to the portion of the tidal submerged lands, as defined in ORS 274.705 (7), and the submersible lands, as defined in ORS 274.005 (8), that are situated within the ocean shore as it does with respect to other state-owned submerged and submersible lands within navigable waters of this state.

(4) In carrying out its duties under subsection (1) of this section with respect to lands and interests in land within the ocean shore, the State Parks and Recreation Department shall act with respect to such lands and interests as it does with respect to other lands and interests within state recreation areas. [1967 c.601 §§2(4), 3; 1969 c.601 §5; 1973 c.364 §1]

**390.630 Acquisition along ocean shore for state recreation areas or access.** The State Parks and Recreation Department, in accordance with ORS 390.121, may acquire ownership of or interests in the ocean shore or lands abutting, adjacent or contiguous to the ocean shore as may be appropriate for

state recreation areas or access to such areas where such lands are held in private ownership. However, when acquiring ownership of or interests in lands abutting, adjacent or contiguous to the ocean shore for such recreation areas or access where such lands are held in private ownership, the department shall consider the following:

(1) The availability of other public lands in the vicinity for such recreational use or access.

(2) The land uses, improvements, and density of development in the vicinity.

(3) Existing public recreation areas and accesses in the vicinity.

(4) Any local zoning or use restrictions affecting the area in question. [1967 c.601 §4; 1969 c.601 §6; 1989 c.904 §24]

### **(Regulating Use of Ocean Shore)**

**390.635 Jurisdiction of department over recreation areas.** Except as provided by ORS 273.551, 274.710 and 390.620, the State Parks and Recreation Department has jurisdiction over the land and interests in land acquired under ORS 390.610, 390.615, 390.620 or 390.630 in order to carry out the purposes of ORS 390.610, 390.620 to 390.660, 390.690 and 390.705 to 390.770. [1969 c.601 §21; 1973 c.364 §2]

**390.640 Permit required for improvements on ocean shore; exceptions.** (1) In order to promote the public health, safety and welfare, to protect the state recreation areas recognized and declared by ORS 390.610 and 390.615, to protect the safety of

the public using such areas, and to preserve values adjacent to and adjoining such areas, the natural beauty of the ocean shore and the public recreational benefit derived therefrom, it is necessary to control and regulate improvements on the ocean shore. Unless a permit therefor is granted as provided by ORS 390.650, no person shall make an improvement on any property that is within the area described by ORS 390.770.

(2) This section does not apply to permits granted pursuant to ORS 390.715, or to rules promulgated or permits granted under ORS 390.725.

(3) This section does not apply to continuous extensions of densely vegetated land areas which are above the 16 foot contour and lying seaward of the line established by ORS 390.770 as of August 22, 1969. The elevation mentioned in this subsection refers to the United States Coast and Geodetic Survey Sea-Level Datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947. [1967 c.601 §5; 1969 c.601 §7; 1973 c.642 §14]

**390.650 Improvement permit procedure.** (1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks and Recreation Department on a form and in a manner prescribed by the department, stating the kind of and reason for the improvement.

(2) Upon receipt of a properly completed application, the State Parks and Recreation Department shall cause notice of the application to be posted at or near the location of the proposed improvement. The notice shall include the name of the applicant, a

description of the proposed improvement and its location and a statement of the time within which interested persons may file a request with the department for a hearing on the application. The department shall give notice of any application, hearing or decision to any person who files a written request with the department for such notice.

(3) Within 30 days after the date of posting the notice required in subsection (2) of this section, the applicant or 10 or more other interested persons may file a written request with the State Parks and Recreation Department for a hearing on the application. If such a request is filed, the department shall set a time for a hearing to be held by the department. The department shall cause notice of the hearing to be posted in the manner provided in subsection (2) of this section. The notice shall include the time and place of the hearing. After the hearing on an application or, if a hearing is not requested, after the time for requesting a hearing has expired, the department shall grant the permit if approval would not be adverse to the public interest. ORS 183.310 to 183.550 does not apply to a hearing or decision under this section.

(4) In acting on an application, the State Parks and Recreation Department shall take into consideration the matters described by ORS 390.655. The department shall act on an application within 60 days after the date of receipt or, if a hearing is held, within 45 days after the date of the hearing.

(a) If the permit is denied upon the grounds that the same would be adverse to the public interest the department shall

make written findings setting forth the specific reasons for the denial.

(b) A copy of the written findings shall be furnished to the applicant within 30 days following denial of the application as provided in this subsection.

(5) Subsections (2) and (3) of this section do not apply to an application for a permit for the repair, replacement or restoration, in the same location, of an authorized improvement or improvement existing on or before May 1, 1967, if the repair, replacement or restoration is commenced within three years after the damage to or destruction of the improvement being repaired, replaced or restored occurs.

(6) The State Parks and Recreation Department may, upon application therefor, either written or oral, grant an emergency permit for a new improvement, dike, revetment, or for the repair, replacement or restoration of an existing, or authorized improvement where property or property boundaries are in imminent peril of being destroyed or damaged by action of the Pacific Ocean or the waters of any bay or river of this state. Said permit may be granted by the department without regard to the provisions of subsections (1), (2), (3), (4) and (5) of this section. Any emergency permit granted hereunder shall be reduced to writing by the department within 10 days after granting the same with a copy thereof furnished to the applicant. [1967 c.601 §6; 1969 c.601 §10; 1979 c.186 §21]

**390.655 Standards for improvement permits.** The State Parks and Recreation Department shall consider applications and issue permits under ORS 390.650 in accor-

dance with standards designed to promote the public health, safety and welfare and carry out the policy of ORS 390.610, 390.620 to 390.660, 390.690, and 390.705 to 390.770. The standards shall be based on the following considerations, among others:

(1) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

(3) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses and improvements, the density of development and the property values in the area.

(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area. [1969 c.601 §11; 1979 c.186 §22]

**390.658 Judicial review of department action on improvement permit application.** Any person aggrieved by the decision of the State Parks and Recreation Department under ORS 390.650 is entitled to petition the circuit court of the county where the property is located for a judicial review, de novo as in equity, of the action or failure to act by the department. A petition filed under this section shall be filed within 60 days after the entry of the findings provided

for in ORS 390.650 (4) or after the expiration of the period prescribed for action, by the department under ORS 390.650. [1969 c.601 §12; 1979 c.186 §23]

**390.660 Regulation of use of lands adjoining ocean shores.** The State Parks and Recreation Department is hereby directed to protect, to maintain and to promulgate rules governing use of the public of property that is subject to ORS 390.640, property subject to public rights or easements declared by ORS 390.610 and property abutting, adjacent or contiguous to those lands described by ORS 390.615 that is available for public use, whether such public right or easement to use is obtained by dedication, prescription, grant, state-ownership, permission of a private owner or otherwise. [1967 c.601 §7; 1969 c.601 §16]

**390.665** [Formerly 274.100 and then 390.740; repealed by 1971 c.743 §432]

**390.668 Motor vehicles and aircraft use regulated in certain zones; zone markers; proceedings to establish zones.** (1) The State Parks and Recreation Department may establish zones on the ocean shore where travel by motor vehicles or landing of any aircraft except for an emergency shall be restricted or prohibited. After the establishment of a zone and the erection of signs or markers thereon, no such use shall be made of such areas except in conformity with the rules of the department.

(2) Proceedings to establish a zone:

(a) May be initiated by the department on its own motion; or

(b) Shall be initiated upon the request of 20 or more landowners or residents or upon request of the governing body of a county or city contiguous to the proposed zone.

(3) A zone shall not be established unless the department first holds a public hearing in the vicinity of the proposed zone. The department shall cause notice of the hearing to be given by publication, not less than seven days prior to the hearing, by at least one insertion in a newspaper of general circulation in the vicinity of the zone.

(4) Before establishing a zone, the department shall seek the approval of the local government whose lands are adjacent or contiguous to the proposed zone. [Formerly 274.090 and then 390.730]

**390.670** [1967 c.601 §8; 1969 c.601 §13; repealed by 1971 c.780 §7]

**390.680** [1967 c.601 §9; 1969 c.601 §17; repealed by 1973 c.732 §5]

**390.685 Effect of ORS 390.605, 390.615, 390.668 and 390.685.** Nothing in ORS 390.605, 390.615, 390.668 and 390.685 is intended to repeal ORS 836.510 to 836.525. [Formerly 274.110 and then 390.750]

**390.690 Title and rights of state unimpaired.** Nothing in ORS 390.610, 390.620 to 390.660, 390.690 and 390.705 to 390.770 shall be construed to relinquish, impair or limit the sovereign title or rights of the State of Oregon in the shores of the Pacific Ocean as the same may exist before or after July 6, 1967. [1967 c.601 §10]

**(Special Permits)**

**390.705 Prohibition against placing certain conduits across recreation area and against removal of natural products.** No person shall:

(1) Place any pipeline, cable line or other conduit across and under the state recreation areas described by ORS 390.635 or the submerged lands adjacent to the ocean shore, except as provided by ORS 390.715.

(2) Remove any natural product from the ocean shore, other than fish or wildlife, agates or souvenirs, except as provided by ORS 390.725. [1969 c.601 §20]

**390.710** [Formerly 274.065; 1969 c.601 §2; renumbered 390.605]

**390.715 Permits for pipe, cable or conduit across ocean shore and submerged lands.** (1) The State Parks and Recreation Department may issue permits under ORS 390.650 to 390.658 for pipelines, cable lines and other conduits across and under the ocean shore and the submerged lands adjacent to the ocean shore, upon payment of just compensation by the permittee. Such permit is not a sale or lease of tide and overflow lands within the scope of ORS 274.040.

(2) Whenever the issuance of a permit under subsection (1) hereof will affect lands owned privately, the State Parks and Recreation Department shall withhold the issuance of such permit until such time as the permittee shall have obtained an easement, license or other written authorization from the private owner, which easement, license or other written authority must meet the

approval of the State Parks and Recreation Department, except as to the compensation to be paid to the private owner.

(3) All permits issued under this section are subject to conditions that will assure safety of the public and the preservation of economic, scenic and recreational values and to rules promulgated by state agencies having jurisdiction over the activities of the grantee or permittee. [1969 c.601 §22]

**390.720** [Formerly 274.070; renumbered 390.615]

**390.725 Permits for removal of products along ocean shore.** (1) No sand, rock, mineral, marine growth or other natural product of the ocean shore, other than fish or wildlife, agates or souvenirs, shall be taken from the state recreation areas described by ORS 390.635, except in compliance with a rule of or permit from the State Parks and Recreation Department as provided by this section. Permits shall provide for the payment of just compensation by the permittee as provided in subsection (5) of this section.

(2) Rules or permits shall be made or granted by the State Parks and Recreation Department only after consultation with the State Fish and Wildlife Commission, the State Department of Geology and Mineral Industries and the Division of State Lands. Rules and permits shall contain provisions necessary to protect the areas from any use, activity or practice inimicable to the conservation of natural resources or public recreation.

(3) On request of the governing body of any coastal city or county, the State Parks and Recreation Department may grant a per-

mit for the removal of sand or rock from the area at designated locations on the ocean shore to supply the reasonable needs for essential construction uses in such localities if it appears sand and rock for such construction are not otherwise obtainable at reasonable cost, and if such removal will not materially alter the physical characteristics of the area or adjacent areas, nor lead to such changes in subsequent seasons. Before issuing a permit the department shall likewise take into consideration the standards described by ORS 390.655. The department may grant a permit to take and remove sand, rock, mineral or marine growth from the area at designated locations. The department shall also issue permits to coastal cities or counties to remove or authorize removal of sand from the ocean shore, under the standards provided by ORS 390.655, if the city or county determines that the sand accumulation on the ocean shore constitutes a hazard or maintenance problem to the city or county.

(4) The terms, royalty and duration of a permit under this section are at the discretion of the department. A permit is revocable at any time in the discretion of the department without liability to the permittee.

(5) Whenever the issuance of a permit under this section will affect lands owned privately, the State Parks and Recreation Department shall withhold the issuance of such permit until such time as the permittee shall have obtained an easement, license or other written authorization from the private owner, which easement, license or other

written authority must meet the approval of the department, except as to the compensation to be paid to the private owner. [1969 c.601 §23]

**390.730** [Formerly 274.090; 1969 c.601 §18; renumbered 390.668]

**390.735** [1969 c.601 §25; repealed by 1973 c.642 §13]

**390.740** [Formerly 274.100; renumbered 390.665]

**390.750** [Formerly 274.110; 1969 c.601 §19; renumbered 390.685]

### (Vegetation Line)

**390.755 Periodical reexamination of vegetation line; department recommendations for adjustment.** (1) The State Parks and Recreation Department is directed to periodically reexamine the line of vegetation as established and described by ORS 390.770 for the purpose of obtaining information and material suitable for a re-evaluation and re-definition, if necessary, of such line so that the private and public rights and interest in the ocean shore shall be preserved.

(2) The State Parks and Recreation Department may, from time to time, recommend to the Legislative Assembly adjustment of the line described in ORS 390.770. [1969 c.601 §27; 1979 c.186 §24]

**390.760 Exceptions from vegetation line.** ORS 390.640 does not apply to any state-owned land or to headlands and other lands located at an elevation of more than 16 feet and seaward of a line running between the following designated and numbered points which are more particularly described by ORS 390.770. The elevation mentioned in this section refers to the United States Coast and Geodetic Survey

Sea-Level Datum of 1929 through the Pacific Northwest Supplementary Adjustment of 1947.

**Point Designation and Number**

From	To
Cl-7-6	Cl-7-7
Cl-7-10	Cl-7-11
Cl-7-13	Cl-7-14
Cl-7-52	Cl-7-53
Ti-7-3	Ti-7-4
Ti-7-6	Ti-7-7
Ti-7-18	Ti-7-19
Ti-7-33	Ti-7-34
Ti-7-83	Ti-7-84
Ti-7-88	Ti-7-89
Ti-7-94	Ti-7-95
Ti-7-99	Ti-7-100
Ti-7-113	Ti-7-114
Ti-7-168	Ti-7-169
Ti-7-183	Ti-7-184
Ti-7-249	Ti-7-250
Li-7-2A	Li-7-3
Li-7-10	Li-7-11
Li-7-17	Li-7-18
Li-7-73	Li-7-74
Li-7-118	Li-7-119
Li-7-150	Li-7-151
Li-7-154	Li-7-155
Li-7-161	Li-7-162
Li-7-165	Li-7-166
Li-7-167A	Li-7-168
Li-7-170	Li-7-171
Li-7-176	Li-7-177
Li-7-182	Li-7-183
Li-7-215	Li-7-216
Li-7-269	Li-7-270
Li-7-293	Li-7-294
Li-7-296	Li-7-297
Li-7-314	Li-7-315
Li-7-325	Li-7-326
Li-7-357	Li-7-358
Li-7-377	Li-7-378
Li-7-439	La-7-1

**Point Designation and Number**

From	To
Cl-7-55	Cl-7-56
Cl-7-76	Cl-7-77
Cl-7-115	Cl-7-116
Cl-7-134	Cl-7-135
La-7-72	La-7-73
La-7-87	La-7-88
Do-8-78	Do-8-79
Co-7-82	Co-7-83
Co-7-111	Co-7-112
Co-7-146	Co-7-147
Co-7-178	Co-7-179
Co-7-200	Co-7-201
Co-7-229	Co-7-230
Cu-7-25	Cu-7-26
Cu-7-54	Cu-7-55
Cu-7-155	Cu-7-156
Cu-7-167	Cu-7-167A
Cu-7-167E	Cu-7-168
Cu-7-174	Cu-7-175
Cu-7-196	Cu-7-197
Cu-7-201	Cu-7-202
Cu-7-219	Cu-7-220
Cu-7-225	Cu-7-226
Cu-7-236	Cu-7-237
Cu-7-258	Cu-7-259
Cu-7-268	Cu-7-269
Cu-7-288	Cu-7-289
Cu-7-310	Cu-7-311
Cu-7-314	Cu-7-315
Cu-7-363	Cu-7-364
Cu-7-382	Cu-7-383
Cu-7-393	Cu-7-394
Cu-7-400	Cu-7-401
Cu-7-440	Cu-7-441
Cu-7-451	Cu-7-452
Cu-7-459	Cu-7-460
Cu-7-493	Cu-7-494
Cu-7-513	Cu-7-514

La-7-9	La-7-10
La-7-19	La-7-20
La-7-44	La-7-45
[1969 c.601 §9]	

Cu-7-516	Cu-7-517
Cu-7-538	Cu-7-539
Cu-7-557	Cu-7-558

et. seq.

## 18. BEACHES AND DUNES

### GOAL

To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and

To reduce the hazard to human life and property from natural or man-induced actions associated with these areas.

Coastal comprehensive plans and implementing actions shall provide for diverse and appropriate use of beach and dune areas consistent with their ecological, recreational, aesthetic, water resource, and economic values, and consistent with the natural limitations of beaches, dunes, and dune vegetation for development.

### INVENTORY REQUIREMENTS

Inventories shall be conducted to provide information necessary for identifying and designating beach and dune uses and policies. Inventories shall describe the stability, movement, groundwater resource, hazards and values of the beach and dune areas in sufficient detail to establish a sound basis for planning and management. For beach and dune areas adjacent to coastal waters, inventories shall also address the inventory requirements of the Coastal Shorelands Goal.

### COMPREHENSIVE PLAN REQUIREMENTS

Based upon the inventory, comprehensive plans for coastal areas shall:

1. Identify beach and dune areas; and
2. Establish policies and uses for these areas consistent with the provisions of this goal.

### IDENTIFICATION OF BEACHES AND DUNES

Coastal areas subject to this goal shall include beaches, active dune forms, recently stabilized dune forms, older stabilized dune forms and interdune forms.

### USES

Uses shall be based on the capabilities and limitations of beach and dune areas to sustain different levels of use or development, and the need to protect areas of critical environmental concern, areas having scenic, scientific, or biological importance, and significant wildlife habitat as identified through application of Goals 5 and 17.

### IMPLEMENTATION REQUIREMENTS

1. Local governments and state and federal agencies shall base decisions on plans, ordinances and land use actions in beach and dune areas, other than older stabilized dunes, on specific findings that shall include at least:
  - a. The type of use proposed and the adverse effects it might have on the site and adjacent areas;
  - b. Temporary and permanent stabilization programs and the planned maintenance of new and existing vegetation;

- c. Methods for protecting the surrounding area from any adverse effects of the development; and
  - d. Hazards to life, public and private property, and the natural environment which may be caused by the proposed use.
2. Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active foredunes, on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding. Other development in these areas shall be permitted only if the findings required in (1) above are presented and it is demonstrated that the proposed development:
- a. Is adequately protected from any geologic hazards, wind erosion, undercutting, ocean flooding and storm waves; or is of minimal value; and
  - b. Is designed to minimize adverse environmental effects.
3. Local governments and state and federal agencies shall regulate actions in beach and dune areas to minimize the resulting erosion. Such actions include, but are not limited to, the destruction of desirable vegetation (including inadvertent destruction by moisture loss or root damage), the exposure of stable and conditionally stable areas to erosion, and construction of

shore structures which modify current or wave patterns leading to beach erosion.

- 4. Local, state and federal plans, implementing actions and permit reviews shall protect the groundwater from drawdown which would lead to loss of stabilizing vegetation, loss of water quality, or intrusion of salt water into water supplies. Building permits for single family dwellings are exempt from this requirement if appropriate findings are provided in the comprehensive plan or at the time of subdivision approval.
- 5. Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977. Local comprehensive plans shall identify areas where development existed on January 1, 1977. For the purposes of this requirement and Implementation Requirement 7 "development" means houses, commercial and industrial buildings, and vacant subdivision lots which are physically improved through construction of streets and provision of utilities to the lot and includes areas where an exception to (2) above has been approved.

The criteria for review of all shore and beachfront protective structures shall provide that:

- a. visual impacts are minimized;
- b. necessary access to the beach is maintained;

- c. negative impacts on adjacent property are minimized; and
  - d. long-term or recurring costs to the public are avoided.
6. Foredunes shall be breached only to replenish sand supply in interdune areas, or on a temporary basis in an emergency (e.g., fire control, cleaning up oil spills, draining farm lands, and alleviating flood hazards), and only if the breaching and restoration after breaching is consistent with sound principles of conservation.
7. Grading or sand movement necessary to maintain views or to prevent sand inundation may be allowed for structures in fore-dune areas only if the area is committed to development and only as part of an overall plan for managing foredune grading. A foredune grading plan shall include the following elements based on consideration of factors affecting the stability of the shoreline to be managed including sources of sand, ocean flooding, and patterns of accretion and erosion (including wind erosion), and effects of beachfront protective structures and jetties. The plan shall:
- a. Cover an entire beach and foredune area subject to an accretion problem, including adjacent areas potentially affected by changes in flooding, erosion, or accretion as a result of dune grading;

- b. Specify minimum dune height and width requirements to be maintained for protection from flooding and erosion. The minimum height for flood protection is 4 feet above the 100 year flood elevation;
- c. Identify and set priorities for low and narrow dune areas which need to be built up;
- d. Prescribe standards for redistribution of sand and temporary and permanent stabilization measures including the timing of these activities; and
- e. Prohibit removal of sand from the beach-foredune system.

The Commission shall, by January 1, 1987, evaluate plans and actions which implement this requirement and determine whether or not they have interfered with maintaining the integrity of beach and dune areas and minimize flooding and erosion problems. If the Commission determines that these measures have interfered it shall initiate Goal amendment proceedings to revise or repeal these requirements.

## **GUIDELINES**

The requirements of the Beaches and Dunes Goal should be addressed with the same consideration applied to previously adopted goals and guidelines. The planning process described in the Land Use Planning Goal

(Goal 2), including the exceptions provisions described in Goal 2, applies to beaches and dune areas and implementation of the Beaches and Dunes Goal.

Beaches and dunes, especially interdune areas (deflation plains) provide many unique or exceptional resources which should be addressed in the inventories and planning requirements of other goals, especially the Goals for Open Spaces, Scenic and Historic Areas and Natural Resources; and Recreational Needs. Habitat provided by these areas for coastal and migratory species is of special importance.

#### **A. INVENTORIES**

Local government should begin the beach and dune inventory with a review of Beaches and Dunes of the Oregon Coast, USDA Soil Conservation Service and OCCDC, March 1975, and determine what additional information is necessary to identify and describe:

1. The geologic nature and stability of the beach and dune landforms;
2. Patterns of erosion, accretion, and migration;
3. Storm and ocean flood hazards;
4. Existing and projected use, development and economic activity on the beach and dune landforms; and
5. Areas of significant biological importance.

#### **B. EXAMPLES OF MINIMAL DEVELOPMENT**

Examples of development activity which are of minimal value and suitable for development of conditionally stable dunes and deflation plains include beach and dune boardwalks, fences which do not affect sand erosion or migration, and temporary open-sided shelters.

#### **C. EVALUATING BEACH AND DUNE PLANS AND ACTIONS**

Local government should adopt strict controls for carrying out the Implementation Requirements of this goal. The controls could include:

1. requirement of a site investigation report financed by the developer;
2. posting of performance bonds to assure that adverse effects can be corrected; and
3. requirement of re-establishing vegetation within a specific time.

#### **D. SAND BY-PASS**

In developing structures that might excessively reduce the sand supply or interrupt the longshore transport or littoral drift, the developer should investigate, and where possible, provide methods of sand by-pass.

#### **E. PUBLIC ACCESS**

Where appropriate, local government should require new developments to dedicate easements for public access to public beaches, dunes and associated waters. Access into or through dune areas, particularly conditionally stable dunes and dune complexes, should be controlled or designed to maintain the stability of the area, protect scenic values and avoid fire hazards.

#### **F. DUNE STABILIZATION**

Dune stabilization programs should be allowed only when in conformance with the comprehensive plan, and only after assessment of their potential impact.

#### **G. OFF-ROAD VEHICLES**

Appropriate levels of government should designate specific areas for the recreational use of off-road vehicles (ORVs). This use should be restricted to limit damage to natural resources and avoid conflict with other activities, including other recreational use.

#### **H. FOREDUNE GRADING PLANS**

Plans which allow foredune grading should be based on clear consideration of the fragility and ever-changing nature of the foredune and its importance for protection from flooding and erosion. Foredune grading needs to be planned for on an areawide basis because the geologic

processes of flooding, erosion, sand movement, wind patterns, and littoral drift affect entire stretches of shoreline. Dune grading cannot be carried out effectively on a lot-by-lot basis because of these areawide processes and the off-site effects of changes to the dunes.

Plans should also address in detail the findings specified in Implementation Requirement (1) of this Goal with special emphasis placed on the following:

- Identification of appropriate measures for stabilization of graded areas and areas of deposition, including use of fire-resistant vegetation;
- Avoiding or minimizing grading or deposition which could adversely affect surrounding properties by changing wind, ocean erosion, or flooding patterns;
- Identifying appropriate sites for public and emergency access to the beach.

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No. 93-

Supreme Court, U.S.  
FILED

SEP 27 1993

OFFICE OF THE CLERK

**In the Supreme Court**  
**of the United States**

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
OREGON, by and through its Department  
of Parks and Recreation,

Respondents.

VOLUME II  
APPENDIX TO PETITION FOR WRIT  
OF CERTIORARI TO SUPREME COURT  
OF THE STATE OF OREGON

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IN THE COURT OF APPEALS  
OF THE STATE OF OREGON

IRVING C. and	)	
JEANETTE STEVENS,	)	Clatsop Circuit
	)	Court No. 90-2061
Plaintiffs-	)	
Appellants,	)	
	)	
v.	)	Court of Appeals
	)	No. 68916
CITY OF CANNON	)	
BEACH, and STATE	)	
OF OREGON,	)	
DEPARTMENT OF	)	
PARKS &	)	
RECREATION	)	
	)	
Defendants-	)	
Respondents.	)	

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APPELLANTS' OPENING BRIEF  
AND ABSTRACT OF OREGON

---

Appeal from the Judgment  
of the Circuit Court  
of the State of Oregon  
for the County of Clatsop

The Honorable Thomas E. Edison, Judge

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## STATEMENT OF THE CASE

### I. NATURE OF THE ACTION

Plaintiffs Irving and Jeanette Stevens are the owners of the Ecola Inn in the City of Cannon Beach. Plaintiffs also own two vacant lots, north of and separated from the Ecola Inn by the Surfsand Resort Hotel. The two lots are zoned for residential/motel use. Plaintiffs applied to defendants for permits to build a retaining wall to develop their vacant lots for motel use by the Surfsand Resort Hotel.

Plaintiffs' permit applications were denied, based, in part, upon the Land Conservation and Development Commission's Goals and Guidelines 18 prohibition of residential, commercial or industrial structure on Oregon's beaches and dunes, enacted in 1985.

Plaintiffs brought this inverse condemnation action against the defendants, asserting five claims for relief. Plaintiffs contend that the Land Conservation and Development Commission's Goals and Guidelines constitutes a "facial", as well as an "as applied", effect a regulation taking of plaintiffs' private property, in that such regulation deprives plaintiffs of any investment-backed expectancy of economic use of their property without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 18 of the Oregon Constitution.

## II. NATURE OF THE JUDGMENT

Both defendants filed motions to dismiss plaintiffs' first, second, third and

fourth claims for relief for failure to state a claim. The first claim alleged an "as applied" taking against the City of Cannon Beach (City). The second claim alleged a facial taking against the City. The third claim alleged an "as applied" taking against the Department of Parks & Recreation (Parks & Rec.) The fourth claim alleged a "facial" taking against Parks & Rec. Defendant State also moved to strike the allegations for inverse condemnation damages and attorneys fees from plaintiffs' fifth claim for relief (A-11).

1,000 Friends of Oregon, the League of Oregon Women Voters, and the Oregon Shores Conservation Coalition filed a motion to appear as amici curiae at trial (Rec. p. 289). Plaintiffs objected (Rec. p. 304). The Circuit Court granted 1000 Friends of

Oregon, the League of Women Voters and the Oregon Shores Conservation Coalition motions to appear as amici curiae and to file a brief in support of defendants' motions to dismiss (Rec. 289).

In a letter opinion, dated July 19, 1991, the Circuit Court held that the case of State ex rel Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) stood for the rule that all beach-front owners of the "dry-sand" portion of Oregon beaches had no rights to exclude the public from the "dry sand" and, therefore, plaintiffs' inverse condemnation action was barred, as no property right was taken. Accordingly, the Circuit Court granted defendants' motions to dismiss plain-tiffs' first, second, third and fourth claims with prejudice (Ab-11-12). The Court also granted the State's motion to

strike. Plaintiffs voluntarily dismissed their Fifth Claim for relief, pursuant to ORCP 67B and May v. Josephine Memorial Hospital, 297 Or 531, 646 P.2d 1015 (1984) in order to allow final judgment upon which this appeal is made. (A-15-16). Plaintiffs appealed from the judgment of dismissal that followed (A-16-17).

### III. APPELLATE JURISDICTION

The court entered judgment against plaintiffs on February 20, 1991 (A-16-17). That judgment, in combination with plaintiffs' voluntary dismissal of their fifth claim for relief disposed of all claims between the parties. Plaintiffs served and filed their notice of appeal on March 20, 1991, 28 days after entry of the judgment (A-17). This appeal is, therefore,

properly before the court. ORS 19.026(1).

#### IV. QUESTIONS PRESENTED ON APPEAL

(1) Did the lower court err in holding that State ex rel Thornton v. Hay, eradicated private owners' rights to any development of the "dry-sand" portion of the beach?

(2) If not, does Thornton constitute a taking of plaintiffs' property without just compensation?

(3) If the answer to either of the above stated issues is affirmative, did the lower court err in not deciding each of defendant's remaining motions to dismiss and in the interest of judicial economy should this Court decide the three pending motions to dismiss?

#### V. SUMMARY OF ARGUMENT

##### Assignment of Error No. 1

The trial court's dismissal of plaintiffs' complaint is erroneous for the following reasons:

(A) Thornton determined that the State could prevent a structure not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the dry sand of Cannon Beach.

(B) To construe Thornton as preventing all economic development of the dry-sand portion of Cannon Beach, and land similarly situated, results in an implied repeal of the Beach Bill (ORS 390.605, et seq.); a result not understood by anyone until this case.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of ancient custom of public recreational use is not applicable to the land in question in this case.

(D) If Thornton is construed to prevent all economic development of private property, it constitutes an unconstitutional taking of plaintiffs' property without just compensation.

#### Assignment of Error No. 2

The lower court erred in not ruling on all of defendants' three additional pending motions to dismiss or strike, i.e.:

(A) Plaintiffs did not adequately plead in their second and fourth claims, that the amended LCDC Goals and

Guidelines 18 constitutes a "facial" taking or per se taking.

(B) Plaintiffs' complaint should be dismissed as plaintiffs failed to exhaust their administrative remedies.

(C) Plaintiffs' claim to attorneys fees should be stricken as not being supported by statute.

If the Court reverses the dismissal of the complaint, then in the interest of judicial economy, this Court should decide the pending motions, so as to avoid another appeal. Such decision should deny each of the pending motions as plaintiffs have adequately alleged Goal 18 is a facial taking and the instant case is entitled to adjudication of "final orders", and

plaintiffs are entitled to attorneys fees and damages upon their inverse condemnation claims.

#### VI. STATEMENT OF FACTS

Plaintiffs own two vacant beachfront lots in the City of Cannon Beach (Tax Lots 8500 and 8501), which they have owned since 1957. Tax Lot 8500 is above and east of the statutory line of vegetation. Tax Lot 8501 lies west of the statutory vegetation line. (A-1) (See also, property survey, App.-1). These parcels have been physically improved by streets and utilities, and are located in an area identified in the local comprehensive plan of Cannon Beach as an area where development existed as of January 1, 1977 (A-1-2). Both vacant lots are zoned for residential/motel use. The lots are

located to the north and adjacent to the Surfsand Resort Hotel; owned by Mr. Steve Martin. The Ecola Inn, owned by plaintiffs, is adjacent and south of the Surfsand Resort Hotel. These lots are the only remaining vacant beach level lots zoned for residential/motel use in Cannon Beach (A-2).

Plaintiffs allege on or about July 20, 1979, plaintiffs leased both parcels to Steve Martin and Raymond Schultens (now deceased) (A-2). The parties agreed that Mr. Martin would build up to an additional 30 motel units on the vacant parcels. The lease extends for a 50-year term, and plaintiffs are entitled to lease-rental proceeds based upon the then current yearly assessed value of the property. Upon termination of the lease, ownership of any buildings on the property reverts to the

plaintiffs (A-2).

On or about January 1, 1985, the Land Conservation and Development Commission (LCDC) amended Goal 18 of the statewide land use planning Goals & Guidelines 18 (Goal 18) to require local governments and state agencies to prohibit any residential, commercial or industrial buildings on "beaches", in order to conserve and protect these areas (A-2-3).

In 1986, Cannon Beach enacted Ordinance Section 3.180 to implement Goal 18 (A-3). Section 3.180 creates an "Active Dune and Beach Overlay" zone (ADBO zone). The Ordinance, as required by amended Goal 18, prohibits all residential development, commercial or industrial buildings within this zone. The ADBO Ordinance covers plaintiffs' land in question. By state law,

Goal 18 applies to Parks & Rec. and the State Land Board.

On August 24, 1989, plaintiffs and Mr. Martin jointly applied to defendant Parks & Recreation (Parks & Rec) for a permit to build a retaining wall on the property to stabilize it for commercial development (A-6), as well as to the State Land Board for a fill permit (Rec. 196). Parks & Rec denied the permit. (A-6) The State Land Board denied the permit. (Rec. 196)

On December 18, 1989, plaintiffs also applied to defendant Cannon Beach for a permit to build a retaining wall (A-3). Plaintiffs' permit application was denied by the City Planning Commission on March 16, 1990 (A-3-4).

Each permit was denied, in part, on the legal ground that plaintiffs' property,

while zoned for residential/motel use, is subject to amended Goal 18, which prohibits all residential, commercial, or industrial development.

#### ASSIGNMENT OF ERROR NO. 1

The Lower Court Erred in Holding that State ex rel Thornton v. Hay, supra, Eradicated Private Owners' Rights to any Development of Their "Dry-Sand" Portion of the Beach.

##### I. STANDARD OF REVIEW

Plaintiffs' complaint was dismissed for failure to state a claim for relief. The standard of review is one of clearly erroneous legal ruling.

Where the issue is the sufficiency of allegations to state a claim, the allegations are taken to be true and the sufficiency of the allegations in the

complaint must be decided "upon the basis of any facts which might conceivably be adduced as proof of such allegations." Mezyk v. National Repossessions, 241 Or. 333, 336, 405 P.2d 840 (1965); DeYarman Allergy Clinic v. Adler, 75 Or. App. 141, 706 P.2d 506 (1985). When that standard is met, the dismissal is legal error.

The federal courts have held that motions to dismiss for failure to state a claim must be viewed with particular skepticism in cases involving inverse condemnation. Moore v. City of Costa Mesa, 886 F.2d 260, 262, (9th Cir. 1989), citing, Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 (9th Cir. 1986), cert. denied, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1120, 99 L.Ed.2d

<sup>1</sup> In *Hall v. City of Santa Barbara*, the Court stated:

"It is axiomatic that '[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.' (citation omitted) This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court has admitted its inability 'to develop any "set formula"' for determining when compensation should be paid, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978), resorting instead to 'essentially ad hoc, factual inquiries' to resolve this difficult question. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 2566-67, 91 L.Ed.2d 285 (1986); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. See *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1558-60 (Fed.Cir. 1985); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 887 (Fed.Cir. 1983)."

## II. ARGUMENT

The trial court accepted the State's bold argument that *Thornton v. Hay, supra*, has extinguished all rights that a private owner of "dry sand" had to construct anything that would impair the public's right to go upon the "dry sand" for recreational purposes. Judge Edison held that plaintiffs have no property right to build on the "dry sand", thus, there could be no "taking" in the constitutional sense caused by the amendment to Goal 18 (prohibiting the construction of all residential, commercial and industrial structures on the "Oregon shore").

The trial court's dismissal of plaintiffs' complaint is erroneous for the following four reasons:

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833 F.2d 1270, 1274 (9th Cir. 1986)

(A) Thornton determined that the State could enjoin the construction of a fence built on the "dry sand", not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.

(B) To construe Thornton as preventing all economic development by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, et. seq.); a result no understood, let alone argued for, by anyone until this case.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of

ancient custom is not applicable to their land.

(D) If Thornton is construed to prevent all economic development of private property consisting of "dry sand", it constitutes an unconstitutional taking of plaintiffs' property.

The above points will be taken in order.

(A) Thornton determined that the State could enjoin the construction of a fence built on the "dry sand", not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.

A brief review of the facts surrounding Thornton is helpful in understanding its holding.

In 1966, Mr. and Mrs. Hay placed driftwood logs upright in front of their motel in Cannon Beach and strung a wire between them to allow their hotel guests use of the dry-sand area. Politicians and several editorialists raised a hue and cry, which prompted the 1967 legislature to adopt the Beach Bill. ORS 390.605, et seq. In the winter of 1967, storm waves washed out the Hays' driftwood pilings. In the spring of 1968, the Hays commenced reconstruction of a more permanent fence. The State sought an injunction, claiming a prescriptive public recreational easement and the power to proscribe development without a permit under the new Beach Bill. The trial judge found a prescriptive easement in the public, and granted the injunction. See McLennan, Public Patrimony: An Appraisal of

Legislation and Common Law Protecting Recreational Values in Oregon's State-Owned Lands and Waters, 4 Environmental L. Rev. 317, 356-359 (Spring, 1974)

On appeal, the parties briefed and argued the prescriptive easement and the Beach Bill's application. Thornton explicitly limited its holding to whether the State could limit the record owner's use and enjoyment of the "dry-sand" area:

"The only issue in this case, as noted, is the power of the state to limit the record owner's use and enjoyment of the dry-sand area, by whatever the boundaries of the area may be described." (Id. at p. 587) (*Italics supplied*)

The Thornton court expressly recognized that the legislature in enacting the Beach Bill (ORS 390.605, et seq.) could not divest the record owner of his rights in his

private property, including the dry-sand area:

"The state concedes that such legislation cannot divest a person of his rights in land, Hughes v. Washington, 389 US 290, 88 S. Ct. 438, 19 L.2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line. Borax Consolidated Ltd. v. Los Angeles, supra." (Id. at 591)

The provisions of the 1967 Beach Bill are enlightening. The Legislature's intent is clearly set forth as follows:

"(1) The legislative assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the sea shore and ocean beaches of the state from the Columbia River on the north to the Oregon/California line on the south so that the public may have the free and uninterrupted use thereof.

(2) The legislative assembly recognizes that over the years the public has made frequent and uninterrupted use of land abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes,

further, that where such use has been sufficient to create easement in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the legislative assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon . . ."

(Codified as ORS 390.610(1), (2) and (3) (1967)) (Emphasis added)

The Oregon legislature's intended control of development is also clearly set forth in the 1967 Act in Section 5 (codified ORS 390.640):

"No person shall, except as provided in Section 6 of this Act, erect, make or place any appurtenance, structure or improvement on any property that is within the area along the Pacific Ocean located between the extreme low tide and the elevation of 16 feet following natural topographic contour lines."

Section 6 of the Act, as now codified  
at ORS 390.650, reads as follows:

"(1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks & Recreation Department on a form and in a manner prescribed by the department stating the kind of and reason for the improvement.

. . .

(4) In acting on an application the State Parks & Recreation Department shall take into consideration the matters described by ORS 390.655.

. . ."

ORS 390.655 provides:

"The State Parks & Recreation Department shall consider application and issue permits under ORS 390.650 in accordance with standards designed to promote the public health, safety and welfare and carry out the policy of ORS 390.610, 390.620-390.660, 390.690 and

390.705-390.770. The standards shall be based on the following considerations, among others:

(1) The public need for healthful, safe, aesthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

(3) The land uses, including public recreational use, if any, the improvements in the area, and trends in land uses and improvements, the density of development and the property values in the area.

(4) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area."

The Beach Bill expressly contemplates development and, thereby contradicts any notion that development rights were expunged by Thornton in the absence of the court's express repeal of ORS 390.640 and 390.650.

Thus, Thornton, read in the light of its historical setting, addressed solely the question of whether the State could limit an owner's use of the dry-sand area. It sustained the lower court's injunction, but on an entirely new ground: the public's interest is based on ancient custom, rather than prescriptive use. The Thornton holding was limited to "the only issue in this case, . . . the power of the State to limit the record owner's use and enjoyment of the dry-sand area, by whatever the boundaries the area may be described." Thornton, Id., at p. 587, (emphasis added).

Thornton did not eradicate an owner's right to any and all development of the dry sand. Its holding allowed an injunction under the Beach Bill because Hays had no permit provided for by the Beach Bill. The

power of the State to invoke the statute was founded upon the "ancient custom" of public recreational use, a right which was neither briefed nor argued before the Thornton court.

- (B) To construe Thornton as preventing all economic development by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, et. seq.); a result not understood, let alone argued for, by anyone, until this case.

Thornton did not repeal, directly, or by implication, ORS 390.650's grant of the right to build upon the "dry-sand" area, if the owner first obtained a permit from the State. The owners' right to development was subject to improvement permits, based upon stated criteria, including, inter alia:

"present and prospective need for conservation";

"development of the resources in the area";

"suitability of the area for particularly uses and improvements";

the "trend and land uses and improvements;

the "density of development and the property values in the area"; and,

the "need for recreational and other facilities and enterprises in the future development of the area".

ORS 370.655

The argument that no such development right has been recognized by the State is absurd in face of the statute, and in the face of the fact that the Department of

Parks & Recreation's predecessor, the State Highway Commission, has granted building permits for a hotel and a motel on the "dry-sand" portion of Oregon's beaches, i.e., Inn at Spanish Head and Driftwood Shores. <sup>2</sup>

Thornton properly analyzed, stands for the proposition that the State may regulate use of the dry-sand portion of Cannon Beach, and other land similarly situated. It did not rule that all development was prohibited, thereby repealing the Beach Bill's permissive development component. The legislature has never repealed the portion of the Beach Bill allowing controlled development in the 22 years since

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<sup>2</sup> Evidence of such permits would have been presented in a motion for summary judgment or at the time of trial, as was mentioned in the hearing on the motion to dismiss (See Tr. p. 22). The motion to dismiss, pursuant to ORCP 21A(8), did not afford plaintiffs such an opportunity.

Thornton. Certainly, the Department of Transportation, or its successor, Parks & Rec., would have sought repeal of the development component by now, if they thought Thornton had repealed, by implication, all building rights on the dry-sand area of Oregon's beaches. No such repeal effort has been found to ever have been attempted by the state in the eleven legislative sessions since Thornton.

(C) Thornton is not res judicata as to plaintiffs, and they have the right to show that the doctrine of ancient custom is not applicable to their land.

Plaintiffs were, obviously, not parties to the Thornton case. Thus, their real property rights could not be effected by the decision. Priest v. Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751 (1914). United States v. Wood, 466 F.2d 1385 (9th

Cir. 1972). As noted by Delo in The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, 4 Environmental L. Rev. 383 (Spring 1974), the holding in Thornton should not have res judicata effect upon third parties owning dry sand who were not before the court.<sup>3</sup>

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<sup>3</sup> The obvious question is how the Oregon supreme court in the Thornton decision can agree with the plaintiffs that the Beach Bill alone cannot 'divest a person of his rights in land' but find that the Beach Bill and the English doctrine of custom together can do so? The answer with respect to Hay is that he had notice of the contested nature of his ownership rights and that the public's use of his beach area satisfied the requirement of English custom as described by the Oregon supreme court. The federal court stated that there was no sudden change in 'either the law or the policy of the State of Oregon. For at least 80 years the state as a matter of right claimed an

Since Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), it is clear that "the right to exclude [others is] 'one of the most

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interest in the disputed land.' Hay, in effect, had his day in court. The remainder of the owners of private beachfront property with the exception of Fultz, however, have not had their day in court. While they can be held to have notice of the contested nature of title to the dry-sand beach area, it does not follow that public use of all the dry-sand area satisfies the requirements of the English doctrine of custom as described by the Oregon supreme court. To so hold, as the court did in Thornton, seems to take property in violation of the Fifth and Fourteenth Amendments. The arguments can be made that the holding violates proper procedure since the other property owners were not before the court to litigate their rights." *Id.* at p. 408.

To the same effect, See: 22 Stanford Law Review 564 (1970)

essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982), quoting Kaiser Aetna, supra. As pointed out above, supra p. 14, none of the parties to the Thornton case briefed or argued the application of custom to the land then in question; nor did Hay move for reconsideration.

This case is, therefore, the first case to question the legality of applying the ancient doctrine of custom to the land in question. Plaintiffs respectfully submit that the Thornton application of ancient custom to their land, contiguous to Hay's land, is legally and factually erroneous.

The Thornton court paraphrased the seven elements of ancient custom, as set forth in Blackstone's, Commentaries (1765-1769), as follows: (1) Antiquity; (2) An exercise of use without interruption; (3) Peaceable use; (4) Reasonable use; (5) Certainty as to the land in question; (6) Use as a matter of right; and (7) Consistency with other custom or law.

Of these elements, the first: antiquity; the second: an exercise of use without interruption; the fourth: reasonable use; the sixth: use as a matter of right; and the seventh: consistency with other custom or law, are each of doubtful applicability in this case, and were of doubtful application to the property before the Thornton court. They shall be analyzed in order:

# 1. Antiquity.

The Thornton court stated, in part:

"Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long 'that the memory of man runneth not to the contrary.' Professor Cooley footnotes his edition of Blackstone with the comment that 'long and general' usage is sufficient. In any event, the record in the case at bar satisfies the requirement of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion." Id. at p. 595-596.

The Thornton court was well aware of the long legal history connected with Oregon's beaches, and its part in it. In 1892, the Oregon Supreme Court, in Bowlby v. Shively, 22 Or 410, 30 P. 154 (1892) ruled that the State held title to the tidelands between low and high tide line, and could sell it, and that an upland owner, taking by

federal patent, had no superior claim to such tidelands sufficient to cloud the title of a subsequent grantee of the State's interest in such tidelands. No mention of a recreational servitude to the tideland is made in the opinion. The decision was affirmed in Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S. Ct. 548 (1894).

In 1899, the Oregon legislature declared:

"The shore of the Pacific Ocean, between ordinary high and extreme low tides, and from the Columbia River on the north to the south boundary line of Clatsop County on the south, is hereby declared a public highway, and shall forever remain open as such to the public." Laws of Oregon (1899, p. 3).

From this legislation, it is clear that the Oregon Legislature was aware that Oregon's title did not run above ordinary high tide, as it did not declare a public right to use

of land to the high water line or mark, but, limited the public highway's east boundary to "ordinary high tide". Nor did the legislature attempt to codify a right to public use of the dry-sand area based on prior long use. Thus, from 1899 to 1913, the only declaration by the State regarding public use to the "beach" involved the tidelands or "wet sands" area of the beach and then only from the Columbia River to the south boundary of Clatsop County.

In 1913, Governor Oswald West introduced a bill, which, upon passage, declared:

"The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California state line on the south, excepting such portion or portions of such shore as may have heretofore been disposed of by the state, is hereby declared a public highway and shall forever remain open as such to the

public." (General Laws of Oregon,  
Chapter 47 1913) (Italics supplied)

This Act extended the public's right to use of the tidelands or "wet sands", under the guise of a public highway, from Clatsop County to the California border, except where the State had earlier transferred said land to a private ownership. The exception of the public's user rights to wet sands which had earlier been conveyed to private parties would indicate that no prescriptive easement or customary use was presumed to override private rights to the exclusive use of wet sands theretofore conveyed by the State. Even more clearly, no common usage by the public to the "dry-sand" area of the beach was thought to exist as late as 1913, so as to vest the public's recreational rights with supremacy over private ownership

of the dry sand.

In fact, the State has entered into 37 separate sales of land below ordinary high tide from 1874 through 1923 up and down the Oregon coast. See, Devers, M.J., The Shore of the Ocean, State Highway Commission (1949), cited in 1969 Beach Bill, 55th Legislative Assembly, prepared by: Office of the Majority Leader, House of Representatives, (App.-2).

In 1947, the legislature repealed the State Land Board's power to alienate its tidelands. By that time, the 250 miles of usable beach along Oregon's 355-mile coast line was held as follows:

"State of Oregon	61	miles
Federal Government	52	miles
Local Government	<u>18.2</u>	<u>miles</u>
Total Public Ownership	131.2	miles (53%)
Total Private		

Ownership                      119.0 miles (47%)

Total Usable  
Beach Area                      250.2 miles."

1967-69 Oregon State Legislature's Interim Committee on Highways, page 22, cited in 1969 Beach Bill, 55 Legislative Assembly (App.-16)

Historically, the State has consistently limited its recreational rights to tidelands or "wet sands" of the Oregon coast, and has sold 47% of the title to the tidelands of Oregon usable beaches. This certainly does not indicate that the legislature, or the State Highway Department, (predecessor to the Parks & Rec.) administered the Oregon beaches with any conception that there were prescriptive rights or rights based on ancient custom relating to Oregon's beaches; either the wet sand or dry-sand portions!

In fact, recreational use of the Oregon beaches, except for Seaside, Gearhart and Astoria, served by rail, awaited the coming of good roads in the 1930s. Taking into account the great depression and World War II, major recreational use of the Oregon shore may be said to have commenced in the late 1940s. See Oregon Blue Book 1985-86, History of Oregon, Terrence O'Donnell, pp. 443-444. (App.-31)

As recently as 1968, one year before Thornton was argued and decided, an initiative petition was submitted to the Oregon electorate proposing a constitutional amendment whereby the State declared its right to the "ocean shore", described as all land between extreme low tide and the line of natural vegetation (in absence of a line of natural vegetation, the line was set at

16 feet above sea level). The State was to give notice to all owners of the "ocean shore" of the State's declared rights to manage the "ocean shore" as a park. Such owners would have one year from receipt of such notice to file claims for recovery of their private rights to the ocean shore. Ballot Title, State Acquisition of Ocean Shore, 1968. (App.-33) The amendment was defeated "No: 464,140 to Yes: 315,175" upon a vote representing a very large turnout of 29% of the State's total population and 80% of the registered voters. Oregon Blue Book 1985-1986, pp. 399, 401 and 404. (App.-38)

Thus, when Thornton is read in its historical context, and with a knowledge of the extensive legislative record concerning Oregon's beaches, two things become apparent: First, the court, without the

benefit of briefs on the application of ancient custom ignored the state's long history of recognizing private property rights in the "wet sand" and "dry-sand" portions of Oregon's littoral land; and Second, the court, without historical referenced announced recreational use by the public, since land tenured systems were adopted and denominated that use a "right". Id. at 595-596.

In this case (as well as in Thornton), a tracing of the public's use of plaintiffs' dry sand may only go back to October 14, 1893, when the land was granted by the United States, through patent, to plaintiffs' (and Hay's) predecessor in title, John Boyson (App.-41). The issuance of the letters patent and recording thereof, bars all prior inchoate unrecorded claims,

except those prior rights noted in the patent.<sup>4</sup> Kerns v. Lee, 142 F. 985 (D.C. Or. 1906), Wilkinson v. Watts, 309 Ill. 607, 141 N.E. 383 (1923), Steel v. St. Louis S & R Co., 106 U.S. 447, 1 S.Ct. 389, 27 L.Ed. 226 (1882), Burlington K & S.W.R. Co. v. Johnson, 38 Kan 142, 16 P. 125 (1887).

As was held in Summa Corporation v. California ex rel State Land Commission and City of Los Angeles, 644 U.S. 198, 80 L.Ed.2d 237, 104 S.Ct. 1751 (1984), even if a state holds a servitude over land, that servitude is extinguished unless presented by the state in the federal patent proceeding, or it is extinguished upon issuance of the fee patent. See also,

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<sup>4</sup> The patent letter under which plaintiffs' claim only excepts water rights, ditches and reservoirs for use in manufacture and agriculture and mining claims. (App.- 77)

United States v. Title Insurance and Trust Co., 265 U.S. 742, 68 L.Ed.2d 1110, 440 S.Ct. 621 (1924); and Barker v. Harvey, 181 U.S. 481, 45 L.Ed. 963, 21 S.Ct. 690 (1901).

The first Ecola Inn was built in 1917 to serve a small logging camp. It was built on a promontory created by a retaining wall over a portion of the dry-sand area of the beach, extending approximately 100 feet west of the uplands (See Photo, App.-79). After an oiled-rock road came from Seaside to Cannon Beach in 1933, the Ecola Tavern was built behind a concrete seawall and car ramp to the beach. (See Photo, App.-80). In 1939, the then owner, E.A. Hollingshead, extended the original seawall north and the present Surfsand Resort Hotel was built. (See Photo, App.-81) Therefore, plaintiffs' predecessors in title have, since 1917,

encroached upon the dry-sand portion of their property without objection by the state or public.

Thus, the antiquity of a claim of public user in Thornton amounts to the period between 1893 and 1917, or 23 years. Since 1917, plaintiffs, and their predecessors in title, have excluded public use of the land enclosed by their retaining wall. This does not readily square with Blackstone's Commentaries concerning antiquity:

"That it have been used so long, that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist."

Blackstone's Commentaries on the Law of England, Vol. I, p. 76, University of Chicago Press (1979).

From the Commentaries, it would also appear that the adoption of the Beach Bill in 1967, would seem to end the custom of unconditional access, as the Beach Bill recognized the dry-sand owners' right to build upon the dry sand, subject to regulation. ORS 390.650-.655.

## 2. Exercise Without Interruption.

The Thornton court stated:

"... a customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right . . ." Id. at p. 596.

At all times since 1917, the plaintiffs, or their predecessors in interest, exercised complete control of the dry-sand area which they had reclaimed for development to welcome the workers of a logging camp and subsequent overnight

tourists and daily restaurant customers. Thus, any use of the dry-sand area occurring after 1893 was interrupted in 1917 by the reclamation of the beach and expansion of that reclamation northward in 1939. Neither the state, nor any member of the public, objected or claimed any rights. In fact, as pointed out above, in 1968, the Oregon voters were presented with the question of litigating and/or paying for private rights to the dry-sand area.

The specific land before this Court lies immediately north of the retaining wall extended in 1939. That property was not enclosed in 1939. The State might argue that the public use of the property here in question, continued beyond 1939 to date. However, as pointed out in plaintiffs' Memorandum in Opposition to Defendant's Rule

21 Motions (Rec. 212), in 1970, the plaintiffs petitioned the State Highway Division to extend the retaining wall around the subject property, which petition was denied. They then, in 1982, petitioned Parks & Rec. to move the zone line westward to conform to the actual line of vegetation, which request was denied. They made the same zone line adjustment request in 1984 to the Department of Transportation, which request was denied.<sup>5</sup>

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<sup>5</sup> "In 1970, plaintiffs first submitted an application to the State Highway Division for a permit to construct a retaining wall to allow a commercial motel on their property. This request was denied. In 1979, as alleged in plaintiffs' [amended] complaint, plaintiffs entered into a joint venture agreement with the new owner of the adjacent hotel, the Surfsands Resort Hotel, to commercially develop their property. Since it was clear from the 1970 denial

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that the state would not grant plaintiffs a permit to build a motel on their property, in 1982 plaintiffs instead submitted a request to the Parks & Recreation Division for a readjustment of the statutory zone line on their property. If the statutory zone line were adjusted to conform to the actual (permanent year-round) vegetation line on plaintiffs' property, plaintiffs would no longer need a permit from the state to build a motel on their property. Plaintiffs' request was denied. Plaintiffs appealed to LUBA, the Land Use Board of Appeals, but the appeal was dismissed on jurisdictional grounds. LUBA directed plaintiffs to appeal future zone line adjustment requests to the Transportation Commission.

In 1984, plaintiffs again submitted a request to the Parks & Recreation Division for a zone line adjustment to allow commercial development of their property. Their request was denied. This time plaintiffs appealed to the Transportation Commission. The Transportation Commission declined to recommend 'piece-meal' zone line adjustments to the legislature on

Therefore, the plaintiffs have, for 20 years, contested through petitions, the public's right to the use of the property in question, to no avail. However, they have attempted to interrupt the public's use by claiming their paramount right to the exclusive use of their property. It was

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behalf of individual private property owners.

The Transportation Commission did, however, direct its staff to establish criteria for periodic review of the statutory beach zone line under the Administrative Procedures Act, so that private property owners would have an appropriate forum to challenge zone line adjustment denials. This has never been done. (Plaintiffs and other private property owners on the coast are left with no recourse to effect a change in the location of the zone line on their property, notwithstanding ORS 390.770)"  
(Rec. pp. 212-211)

their only recourse, which failed in each instance.

4. Reasonableness of Public Use.

The Thornton court states this element of custom as follows:

"The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community . . ." Id. at p. 596.

Sir William Blackstone's Commentaries seem to convey a different meaning of reasonableness of public use. Rather than connoting that peaceable enjoyment consistent with the land as satisfying this element, the Commentaries connote a concept of balancing the use of the land by the public against any good legal reason against

such use.<sup>6</sup> The "good legal reason" assigned against customary use of the dry sand is the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. Kaiser Aetna v. U.S., supra, at p. 17, Loretto v. Teleprompter Manhattan CATV Corp., supra, at p. 17; and Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 31, 97 L.Ed.2d 677 (1987). The

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<sup>6</sup> "Custom must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Blackstone's *Commentaries*, *supra*, p. 77

plaintiffs have exercised futile, but consistent efforts to enjoy their right to exclusive use of the dry-sand property in question, north of the 1939 extension of the retaining wall; which efforts have been rebuffed by the numerous bureaucracies appointed to administer the Beach Bill.

6. Public Use as a Matter of Right.

The Thornton court stated this element as follows:

"The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes . . ." Id. at p. 597.

It cannot be denied that plaintiffs and the adjacent property owner have appropriated a portion of the dry sand of

Cannon Beach since 1917, and plaintiffs have endeavored to reclaim the property to the north for their exclusive use for over 20 years. Nor can it be argued that Driftwood Shores on the Oregon coast, and the Inn at Spanish Head have also developed dry sand, held in fee simple, for the exclusive use of private patrons. Indeed, the City of Seaside with its renowned vehicular turn around and one mile of esplanade has exercised domain over a very large portion of the dry-sand area of Seaside Beach. Thus, the custom on Cannon Beach, and land similarly situated, is not uniform and the public has not exercised recreational rights to these portions of the dry-sand areas of Oregon's beaches as a matter of right. The public has used the north portion of plaintiffs' property despite plaintiffs'

frustrated efforts to make some economic use of their property during the last 20 years as authorized by the Beach Bill.

7. Consistency With Other Custom.

The Thornton court stated the seventh element of custom as follows:

"Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law." Id. at p. 597.

It is again submitted that the custom adopted in Thornton is inconsistent with the development component of the Beach Bill if it denies all development of the dry-sand area of the beach. It is also repugnant to the property rights of plaintiffs to exclude the public, so that they may make some economic use of the property, consistent with reasonable regulation provided for in

the Beach Bill. Nollan v. California Coastal Commission, supra.

In conclusion, prior to Thornton, neither Oregon's courts, its legislature, its administrative bodies, nor the public, have dealt with the dry-sand portions of Oregon's beaches as being subject to an ancient custom of recreational servitude. On the contrary, the plaintiffs, and their predecessors in title, have developed a portion of the dry-sand area they own, along with their neighbor to the north, for their exclusive commercial use, and since 1967, following adoption of the Beach Bill, have sought to make use of the remainder of their property to the north through all legal means available to them, without success. Thornton's holding is entirely inconsistent with the Beach Bill and plaintiffs'

constitutionally protected property rights.

- (D) If Thornton is construed to prevent all economic development of private property consisting of "dry sand", it constitutes an unconstitutional taking of plaintiffs' property.

The position taken by the State, as echoed by the City and amici, and adopted by the trial court: that Thornton eradicates an owner's right to build anything on the dry-sand area of Cannon Beach, violates Article I, Section 18 of the Oregon Constitution<sup>7</sup> and the Fifth Amendment to the

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<sup>7</sup> Oregon Constitution, Article I, Section 18:

"Private property should not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the State, without such compensation first assessed and tendered . . ."

U.S. Constitution, made applicable to this action by the Fourteenth Amendment.<sup>8</sup> A court's denial of a constitutionally protected right by declaring the right does not exist, is no more valid than a legislative or administrative taking. Ruckelshaus v. Monsanto, 467 U.S. 986, 1001, 104 S.Ct. 2862, 2872, 81 L.Ed.2d 814 (1984), Webbs Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 100 S.Ct. 1062, 90 L.Ed.2d 358

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<sup>8</sup> U.S. Constitution, Fifth Amendment:

"No person shall . . . be deprived of life, liberty of property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Fourteenth Amendment, Section 1:

"No state shall . . . deprive any person of life, liberty or property, without due process of law;"

(1980), Hughes v. Washington, 389 U.S. 290, 296-297, 88 S.Ct. 438, 442-443, 19 L.Ed. 2530 (1967). Smith v. Dept. of Human Resources, 301 Or. 209, 721 P.2d 445 (1986), cert. granted, 480 U.S. 916, vacated, 485 U.S. 660, on remand, 307 Or. 68, 763 P.2d 146 (1988), cert. granted, 489 U.S. 1077 (1989).

A case wrongly decided or outmoded by later events and subsequent decisions should be overruled. Heino v. Harper, 306 Or. 347, 759 P.2d 253 (1989); G.L. v. Kaiser Foundation Hospitals, Inc., 306 Or. 54, 757 P.2d 1347 (1988). See also, Judge Unis' dissent in Hammond v. Central Lane Communications Center, 312 Or. 17, \_\_\_\_ P.2d \_\_\_\_ (1991). This case fits criteria (1) and (2) enunciated in G.L. v. Kaiser

Foundation Hospitals, Inc., supra.<sup>9</sup>

As shown, below, the application of ancient customary public use to the land in question before the court in Thornton was inadequately considered. Further, ORS

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<sup>9</sup> "Ordinarily this court reconsiders a non-statutory rule or doctrine only upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided; (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or (3) that the earlier rule was grounded in an tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed. Without some such premise, the court has grounds to reverse a well-established rule besides judicial fashion or personal policy preference, which are not sufficient grounds for such a change.  
G.L. v. Kaiser Foundation Hospitals, Inc., 306 Or. at p. 59.

105.655<sup>10</sup>, et. seq., was adopted in 1971, two years after Thornton, to limit Thornton's application to the "ocean shore"

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<sup>10</sup> ORS 105.677

**"Permissive recreational use of land does not create easement; preservation of preexisting public rights. (1) An owner of land who either directly or indirectly invites or permits any person to use the land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of the land for any recreational purpose without the consent of the owner.**

(2) The fact that an owner of land allows the public to recreationally use the land without posting or fencing or otherwise restricting use of the land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public the right to continued use of said land.

(3) Nothing in this section shall be construed to diminish or divert any public right acquired by dedication, prescription, grant, custom or otherwise existing before October 5, 1973.

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described in ORS 390.605-770. By so limiting Thornton, the legislature clearly expressed its public policy that ancient custom could not be used to take other private property in Oregon. Finally, upon the decisions in Kaiser Aetna v. United States, supra, Loretto v. Teleprompter Manhattan CATV Corp., supra, and Nollan v. California Coastal Commission, supra, the Thornton holding, as now interpreted by the lower court herein, cannot stand as good law.

The State's bold assertion that Thornton precludes any development on the dry sand is inconsistent with comments of the Oregon Supreme Court, made in another context. In Suess Builders v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982), a property owner sought approval for

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residential development of land, so zoned, but was denied a right to develop the land. Thereafter, the City's comprehensive plan was amended designating two-thirds of the land for a future public park. The designation remained for seven years, making the land unavailable for development or sale at its fair market value. The landowner sued in inverse condemnation for the temporary taking, which deprived it of a fair return on its investment. The defendant city moved to dismiss the complaint on grounds that it failed to state a cause of action, which motion was granted. In reversing the dismissal, Justice Linde, speaking for the full court, noted that:

"Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land.<sup>5</sup>" Id. at p. 259.

However, in footnote 5 following that statement, the court noted, in part:

" . . . As we understand it, 'investment-backed expectations' are a necessary but not a sufficient element before a regulation precluding any economic use of property can be attacked as a compensable taking or as a deprivation of property under the 14th amendment; but private property actually taken for public use must be paid for whether it represents an investment or not. Of course there are hypothetical and not so hypothetical situations in which it may be argued that government is misusing regulatory power to impose on private property the burdens of actual governmental or public uses as a means of circumventing its obligation to pay, as for instance by . . . imposing a right of passage for the public across private land. See, e.g. Kaiser Aetna v. United States [citation omitted]; . . ."  
Id. at p. 259, ft. 5.

"[I]mposing a right of passage for the public across private land" is exactly what the State argues Thornton accomplished. An accomplishment which the Oregon Supreme

Court in Suess, at footnote 5, determined would require compensation.

That aside, the broad reading of Thornton contended for by the State cannot be sustained in the face of Nollan v. California Coastal Commission, supra. In Nollan, plaintiff owned a beachfront house in California whose property line ran to the mean high tide line. See: Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 8 L.Ed 9 (1935). The Nollans' request to build a larger house on their property was conditioned by the California Coastal Commission upon the Nollans' grant to the state of an easement across their beachfront property (dry sand) parallel to the foreshore. The Supreme Court succinctly put to rest the notion that a state agency could impose public access to

private property without compensation. The Supreme Court stated:

"Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt that there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather, (as Justice BRENNAN contends) 'a mere restriction on its use,' post, at 3154, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interest, so long as it pays for them. [citation omitted] Perhaps because the point is so obvious we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other government action leads to the same conclusion. We have repeatedly held that as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of the rights that are commonly characterized

as property.'" (Id., 483 U.S. at p. 831, 107 S.Ct. at 3145, 97 L.Ed.2d at p. 685-686)

Where government action results in a permanent, physical occupation of the property by the government itself or by others the Supreme Court has uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Loretto v. Teleprompter Manhattan CATV Corp., supra, and Kaiser Aetna v. United States, supra. The Nollan court also held that a "permanent, physical occupation" has occurred for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular

individual is permitted to station himself permanently upon the premises. Nollan, supra, 483 U.S. at 831-832, 107 S.Ct. at 3145, 97 L.Ed.2d at 685-686.

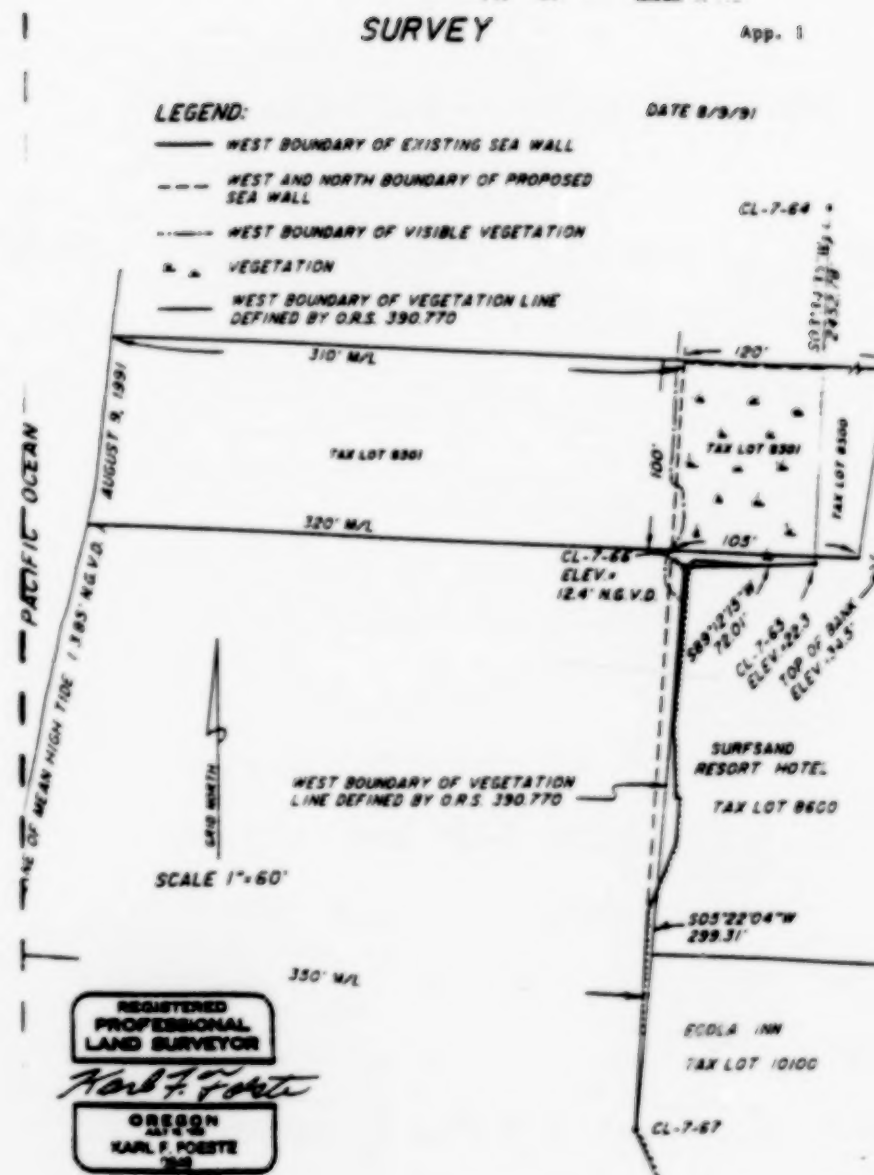
The jurisprudence of "taking without just compensation" has enormously expanded since Thornton. The vast majority of courts visiting the question of total prohibition of development of private property under the broad banner of police power have held that such outright prohibition constitutes a taking. See, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Browning-Ferris Indus. v. City of Maryland Heights, 747 F.S. 1340 (E.D. Mo. 1990) (zoning ordinance putting land fill out of existence constituted a taking); Lockary v. Kayfetz, 908 F.2d 543 (9th Cir.

1990) (water district's moratorium on water hook-ups presented factual questions of Fifth Amendment taking) rehearing den., 917 F.2d 1150 (9th Cir. 1990) Althous v. United States, 7 Ct.Cl. 688 (D.C. 1985) (ordinance requiring owner to maintain property in an undeveloped state constituted a taking), Annicelli v. Town of South Kingston, 463 A.2d 133 (R.I. 1983) (High Flood Danger District Ordinance which prohibited erection of single-family dwelling on barrier beach to protect beaches and dunes from erosion and to protect health, safety and welfare of public was a "taking"; Seidner v. Islip, 439 N.E. 352 (N.Y. 1982) ("Dune District" ordinance which limited improvements on plaintiff's property to pedestrian dune crossings and fences constituted a "taking"); Bartlett v. Zoning Commission,

282 A.2d 907 (Conn. 1971) (ordinance which restricted use of tidal wetlands to wooden walkways, wharfs, duck blinds, public boat landings and public ditches effects a taking); Maine v. Johnson et ux, 265 A.2d 711 (Me. 1970) (Wetlands Act prohibiting fill of tidelands rendering private property economically useless is a "taking"); Florida Rock Industries v. United States, 8 Ct.Cl. 160 (1985), mod., 791 F.2d 893 (1986), cert. denied, 479 U.S. 1053 (1987), on remand, 21 Ct.Cl. 161 (1990) (denial of dredge and fill permit for mining wetlands effects a "taking" where plaintiff was denied viable economic use of property); De St. Aubin v. Flacke, 496 N.E.2d 879 (1986) (denial of permit to fill tidal wetlands for residential development did not effect a "taking" where wetland restrictions

permitted cluster development and plaintiff failed to show that request for rezoning to cluster use would be denied by town). Dooley v. Town Planning Commission, 197 A.2d 770 (Conn. 1964) (zone change to flood plan restricting land development of parks, playgrounds, parking, etc. was confiscatory taking). See also, Drakes Bay Land Co. v. United States, 424 F.2d 574, (Ct.Cl. 1970) (National Park regulation of private property within park boundaries which effectively barred such land from development, constitutes a "taking"). Et seq.

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BALLOT TITLE

STATE ACQUISITION OF OCEAN SHORE

PURPOSE: Constitutional amendment. Defines "Ocean shore" as shore between extreme low tide and vegetation line. Dedicates "ocean shore" as perpetual public park. Prohibits sales by state, political subdivisions. Allows leasing, easements and licenses in "ocean shore" if consistent with public use and enjoyment. Directs state identify and maintain public rights to "ocean shore." Requires state give written notice to claimants who may contest state's interest within one year thereafter. Confirms existing public rights in "ocean shore."

Be It Enacted by the People of the State of Oregon:

The Constitution of the State of Oregon is amended by creating a new section to be added to and made a part of Article XV and to read:

Section 10. (1) Ownership of the ocean shore, except any portions that may have been disposed of or not acquired by this state before the effective date of this section, is vested in the State of Oregon. Such ocean shore and all portions thereof acquired by the State of Oregon after the effective date of this section or the ownership of which is vested on or after the effective date of this section in a political subdivision within this state, shall be held forever as a park and recreational and scenic place, and shall not be alienated; however, leases, easements and licenses may be granted

with respect thereto in a manner prescribed by state law for purposes consistent with the public use and enjoyment thereof.

(2) The state agency charged by law with administering parks and recreational and scenic places shall take appropriate action in a manner consistent with law to identify and maintain public rights heretofore or hereafter acquired by dedication, prescription, grant or otherwise to any portion of the ocean shore that may not be owned by the State of Oregon or a political subdivision within this state.

(3) (a) As to all persons claiming any right, estate, lien or interest in the ocean shore, it shall be conclusively presumed that from and after the date on which notice is served as provided in this subsection the State of Oregon is in actual, hostile, visible, notorious, exclusive and physical possession of the ocean shore. This presumption shall not apply to persons who were or hereafter shall be in actual

physical possession of some portion of the ocean shore.

(b) Every action, suit or proceeding for the recovery of any right, estate, lien or interest in the ocean shore or to recover possession thereof shall be commenced within one year after the date the notice is served as provided in this subsection. For all purposes this subsection shall be construed as a statute of prescription as well as a statute of limitations.

(c) The state agency charged by law with administering parks and recreational and scenic places shall search the deed records of all counties in which ocean shore is located and shall give notice to any person, except the United States Government or an agency or department thereof, who appears from such records to claim any right, estate, lien or interest in the ocean shore. Notice given as provided in this subsection constitutes notice to all persons

claiming, through unrecorded instruments, any rights, estate, lien or interest in the ocean shore. The notice shall be served personally or by registered or certified mail to the last known address of the person to be served and shall include a copy of this subsection.

(d) It shall be considered the people's intent, in adopting this subsection, that if this subsection or any part thereof is held invalid under the Constitution of the United States, the remainder of this section shall continue in force.

(4) Nothing in this section divests the State of Oregon or a political subdivision within this state of its ownership of, or interest in, any real property, or limits any public rights heretofore or hereafter acquired by dedication, prescription, grant or otherwise.

(5) As used in this section, "ocean shore" means the shore of the Pacific Ocean between the line of extreme low tide and the line of natural

vegetation, from the Columbia River to the southern boundary of the State of Oregon; except that if the line of natural vegetation along any area of the ocean shore cannot be determined, the general trend of the line of 16-feet elevation above sea level, as determined in a manner consistent with law, shall constitute the boundary of the ocean shore along that area instead of the line of natural vegetation. However, at the mouth of a stream, estuary, river or creek, the ocean shore is considered to be between the line of extreme low tide and a straight line beginning at a point nearest the ocean on the line of natural vegetation or the line of 16-feet elevation above sea level, as the case may be, on one side, and extending across the mouth to a similar point on the opposite side. All elevations above sea level are referred to the United States Coast and Geodetic Survey Sea-Level Datum of 1929, as adjusted from time to time. The state agency charged by law

with administering parks and recreational and scenic places shall determine the line of extreme low tide and the line of natural vegetation in a manner consistent with law.

IN THE SUPREME COURT  
OF THE STATE OF OREGON

IRVING C. and	)	
JEANETTE STEVENS,	)	
	)	TRIAL COURT
Petitioners	)	
on Review,	)	No. 90-2061
	)	
v.	)	APPELLATE COURT
	)	No. A68916
CITY OF CANNON	)	
BEACH, and	)	
STATE OF OREGON,	)	
DEPARTMENT OF	)	
PARKS &	)	
RECREATION,	)	
	)	
Respondents	)	
on Review.	)	

**PETITION FOR REVIEW OF  
IRVING C. and JEANETTE STEVENS**

Petition for review of the decision of  
the Court of Appeals on appeal from a  
judgment of the Circuit Court for Clatsop  
County, Honorable Thomas E. Edison, Judge.

Court of Appeals Opinion Filed:

August 5, 1992;

Honorable John H. Buttler.

**I. PRAYER FOR REVIEW.**

Irving C. and Jeanette Stevens,  
Appellants below and Petitioners on Review  
pray that the Supreme Court of the State of  
Oregon grant review of the Court of Appeals  
decision in the above-captioned case  
(Stevens et al. v. City of Cannon Beach, et  
al., 114 Or. App. 457, \_\_\_ P.2d \_\_\_ (1992)  
and reverse the decision which affirms the  
trial court's dismissal of Appellants-  
Petitioners' claims of inverse condemnation  
against Respondents.

**II. REASONS FOR REVERSAL.**

**A. NATURE OF THE DECISION:**

The Court of Appeals held that the  
trial court correctly interpreted State ex  
rel Thornton v. Hay, 254 Or. 584, 462 P.2d  
671 (1969) as having eradicated all  
development rights on the dry sand portion

of Cannon Beach by private owners and, therefore, the Stevens could not assert an inverse condemnation claim for denial of their right to build a retaining wall because they simply had no development rights whatsoever since 1969, the year of the Thornton decision.

The Court of Appeals stated:

"The question before this court, therefore, is necessarily very narrow. We must follow the Supreme Court's decision unless, as plaintiffs argue, that decision constitutes a taking in itself and is contrary to the United States Supreme Court decisions applying the Takings Clause of the Fifth Amendment." (Opinion p. 2, emphasis in original)

The Court of Appeals then noted that Lucas v. South Carolina Coastal Council, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 120 L.Ed.2 798 (1992) held that regulations or decrees that deprive land of all economically beneficial use may be sustained only if the statute or

court decree creating such proscription adhered to the owner's title to begin with, when the owner purchased the property.

The Court of Appeals, in footnote 2 of its Opinion, noted that while Stevens acquired the property in question in 1957 (some 12 years before Thornton), they were still bound by Thornton's holding that the public had a right to exclusive occupation of the dry sand beach based upon the English common law doctrine of ancient customs, because the Thornton holding was inexplicably merely an enunciation of the law which existed "long before 1957." (Opinion p. 3, fn 2)

The Court of Appeals, finding itself bound by Thornton, as interpreted by the lower court, sustained the trial court's dismissal of the Stevens "takings" claims.

**B. SPECIFIC ERRORS REQUIRING REVERSAL**

1. The Court of Appeals erroneously limited its analysis of Thornton by merely accepting the State's expansionist reading of Thornton as eradicating all improvement rights by owners of the dry sand, a position never before adopted by any court in Oregon prior to the trial court's ruling, which interpretation directly conflicts with the recent Supreme Court case of Lucus v. South Carolina Coastal Council, supra. See: State ex rel Thornton v. Hay, 254 Or 584, 462 P2d 671 (1969) and Lucus v. South Carolina Coastal Council, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 120 L.Ed.2d 798 (1992).

2. The Court of Appeals illogically begs the question of Thornton's retroactive application to pre-Thornton dry

sand property owners by its conclusory statement in footnote 2 that:

"Plaintiffs argue that their interest, acquired in 1957, predated the decision in State ex rel Thornton v. Hay, supra, and is therefore senior to the public rights recognized in that case. However, the date of the decision is not relevant. Rather, the question is when, under the reasoning of Hay, the public rights came into being, and the answer is that that must [have] occurred long before 1957." (Opinion p. 4, fn 2.)

See Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); Marriage of Vinson, 57 Or App 355, 644 P.2d 635, rev. den. 293 Or. 456, 650 P.2d 928 (1982) and The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay, (4 Env. L.Rev. 383, Spring 1974).

3. The Court of Appeals erred in implying that Lucus, supra, defers to State property and nuisance law, when retroactively applied.

See Lucus v. South Carolina Coastal Council,  
supra.

4. The Court of Appeals misconstrued its role as not encompassing the power to limit Thornton so as to be consistent with the State's own policies of beach development and so as not to impliedly repeal ORS 390.650 (the development component of the Beach Bill).

See: ORS 390.650-655.

5. The Court of Appeals erred in failing to decide the propriety of the trial court's dismissal of the taking claims on a Rule 21(A)8 motion, upon which no evidence can be adduced to support the facial and as applied taking claims. See: ORCP 21A(8).

6. The Court of Appeals erred in failing to decide the Stevens request that

it decide pending motions not decided by the trial court so as to avoid further appeals if reversal and remand is ordered by this honorable court.

7. The Court of Appeals erred in refusing to allow the Stevens to file a brief in response to the amici curiae brief.

### III. ARGUMENTS IN SUPPORT OF REASONS TO REVIEW AND REVERSE.

The arguments for review and reversal are set forth below under headings used in Section II B above.

1. THE COURT OF APPEALS ERRONEOUSLY LIMITED ITS ANALYSIS OF THORNTON BY MERELY ACCEPTING THE STATE'S EXPANDED INTERPRETATION OF THORNTON AS ERADICATING ALL IMPROVEMENT RIGHTS BY OWNERS OF THE DRY SAND, A POSITION NEVER BEFORE ADOPTED BY ANY

COURT IN OREGON PRIOR TO THE TRIAL COURT'S RULING, WHICH INTERPRETATION DIRECTLY CONFLICTS WITH THE RECENT U.S. SUPREME COURT CASE OF LUCUS v. SOUTH CAROLINA COASTAL COUNCIL, supra.

The Court of Appeals obviously felt it had no power to examine the scope of Thornton, and therefore limited its analysis of it to reciting the oft-quoted conclusory words of Justice Goodwin that the Thornton decision: ". . . takes from no man anything which he has had a legitimate reason to regard as exclusively his." (254 Or. at 599) The Court of Appeals thus felt bound to state, "Plaintiff's have never had the property interests that they claim were taken by defendants' decisions and regulations." (Opinion p. 2.)

The decision of the Court of Appeals cannot be sustained in the face of Lucus.

supra. In Lucus, the U.S. Supreme Court explicitly ruled:

" . . . We have . . . described at least two discreet categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the proper owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. [Citing: Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982)] (120 L.Ed.2d at 812)

"The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. [Citing: Agins v. City of Tiberon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Keystone Bituminous Coal Assn. v. DeBenedictus, 480 U.S. 470, 107 S.Ct. 1234, 94 L.Ed.2d 472 (1987) and Hodel v. Virginia Surface Mining and Reclamation Assn., Inc., 452, U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)] (120 L.Ed.2d at 813)

The U.S. Supreme Court further held in Lucas that in the case of land:

"... [W]e think the notion pressed by the council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." (120 L.Ed.2d at 820)

"Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 426. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the

courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." (120 L.Ed.2d at 821)

In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the U.S. Supreme Court ruled that the right to exclusive occupation of one's land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 483 U.S. at p. 831, 107 S.Ct. at p. \_\_\_, 97 L.Ed.2d at pp. 685-586 (1987). The Nollan court further held a "permanent physical occupation" has occurred for purposes of a taking analysis, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to

station himself permanently upon the premises. 483 U.S. at p. 831-832, 107 S.Ct. at p. 3145, 97 L.Ed.2d at p. 686. Thus, under Lucus, supra, and Nollan, supra, Thornton, as now interpreted by the Court of Appeals, constitutes both a "permanent physical occupation" takings as well as a confiscatory regulation takings. Such takings can be accomplished by court decree as well as by statute or regulation. See Lucus, 120 L.Ed.2d 831.

No one has, or could, argue that when the Stevens purchased the property in question for additional motel units in conjunction with their neighbor, that the state or affected property owners could enjoin such construction based on doctrines of property or nuisance law. In fact, in 1967, in adoption of the Oregon Beach Bill, ORS 390.605, et seq., the Oregon legislature

explicitly contemplated development and improvements on the dry sand of Oregon beaches subject to reasonable regulations by the State through the Department of Transportation. See ORS 390.650-655. Thus, the Thornton court, by sua sponte decree some 12 years after the Stevens purchased their land, proscribed all economically beneficial use of the dry sand portion of the property. A practice explicitly prohibited by the Lucus decision.

This Court can avoid the collision of Thornton with Lucus by holding Thornton to its facts, i.e., the State has power to reasonably limit construction on the dry sand pursuant to the Oregon Beach Bill, but not to deprive an owner of all economic use of the land.

In fact, no Oregon court in the 23 years since Thornton has ever interpreted

Thornton as imposing a total prohibition of dry sand private economic development, until the Court of Appeals below did so. That holding required the Court of Appeals to distinguish Lucas. The plaintiff respectfully submits that the Court of Appeals did not distinguish Lucas. This Court should now address the issue.

2. THE COURT OF APPEALS BEGS THE QUESTION OF THORNTON'S RETROACTIVE APPLICATION TO PRE-THORNTON DRY SAND PROPERTY OWNERS BY ITS CONCLUSORY STATEMENT IN FOOTNOTE 2 THAT:

"PLAINTIFFS ARGUE THAT THEIR INTEREST, ACQUIRED IN 1957, PREDATED THE DECISION IN STATE EX REL THORNTON V. HAY, SUPRA, AND IS THEREFORE SENIOR TO THE PUBLIC RIGHTS RECOGNIZED IN THAT CASE. HOWEVER, THE DATE OF THE DECISION IS NOT RELEVANT. RATHER, THE QUESTION IS WHEN, UNDER THE REASONING OF HAY, THE PUBLIC RIGHTS CAME INTO BEING, AND THE ANSWER IS THAT THAT MUST [HAVE] OCCURRED LONG BEFORE 1957." (Opinion p. 4, fn 2)

The Court of Appeals erred in assuming Thornton's now expanded meaning retroactively applies to all privately owned dry sand of Oregon's beaches regardless of private owners' rights acquired with the title purchased before Thornton. As noted by Delo in The English Doctrine of Customs in Oregon Property Law: State ex rel Thornton v. Hay, (4 Env. L. Rev. 383, Spring 1974) and in 22 Stanford Law L. Rev. 564 (1970), the Thornton decision, applied to other property owners of dry sand retroactively, presents serious problems of violation of the takings clause and the due process clause of the Fifth Amendment of the United States Constitution. (Plaintiff's brief pp. 17-18, fn 3)

Retroactive application of Thornton should not occur, as to do so violates the criteria of when a court-made rule should

not have retroactive effect. In Chevron Oil v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court succinctly stated the criteria to be used in limiting a decision to prospective application only:

"First, the decision to be applied retroactively must establish a new principal of law either by overruling clear past precedent on which litigants may have relied. [Citing: Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 at 496] Or by deciding an issue of first impression whose resolution was not clearly foreshadowed [Citing: Alan v. State Board of Elections, 393 U.S. at 572] Second, it has been stressed that 'we must & weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [Citing: Linkletter v. Walker, 381 U.S. at 629] Finally, we have weighed the inequity imposed by retroactive application for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by holding of nonretroactivity.' Cipriano v. City of

Houma, 395 U.S. at 706" (404 U.S. at 403-404) (Emphasis added)

Clearly, Thornton established a new principal of law by deciding "an issue of first impression whose resolution was not clearly foreshadowed." Admittedly, under the second criteria, the application of retroactive effect would further the state's interest in obtaining the "essential stick" of exclusive use of dry sand by private owners without compensation. However, such retroactive effect does direct violence to the essential property right of exclusive use and does further violence to the due process clause of the Fifth Amendment to the U.S. Constitution with the inequitable result of a taking of property without compensation, under the third criteria.

The criteria for considering retroactivity is well-established in Oregon.

See Marriage of Vinson, 57 Or. App 355, 644 P2d 635, rev. den. 293 Or. 456, 650 P2d 928 (1982) (nonretroactivity applied to McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed.2d 589 (1981); Moen v. Peterson 312 Or. 503, 824 P2d 404 (1991) (applied retroactive holding of Hartzog v. Keeney, 304 Or. 57, 742 P2d 600 (1987) as it applied an earlier rule announced in Krummacher v. Gierloff, 290 Or. 867, 627 P2d 458 (1981)). See also American Trucking Association v. Smith, 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990); McKesson v. Div. of Alcohol of Florida, 496 U.S. 18, 110 S.Ct. 2323, 110 L.Ed.2d 17 (1990).

Of great importance is the Court of Appeals cursory treatment of Thornton's retroactive application which totally ignores the Supreme Court's specific holding in Lucas, supra, which requires compensation

for a retroactive application of a new rule depriving land owners of all economic benefit from their land:

"Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logical antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think with our "takings" juris- prudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property. . . . In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

"Where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved; [Citing: Loretto v. Teleprompter Manhattan CATV

Corp.] - though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare Stranton v. Wheeler, 179 U.S. 141, 163 (1900) (interests of 'riparian owner in the submerged lands . . . bordering on a public navigable water' held subject to Government's navigational servitude), with Kaiser Aetna v. United States, 444 U.S. at 178-180 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must adhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place[d] upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise." [Footnotes omitted] (120 L.Ed2d at 830-821) (Emphasis added)

In Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987), the right to exclusive occupation of one's land is "one of the most essential sticks in the bundles of rights that are commonly characterized as property." Citing: Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979) and Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

Clearly, neither the State, nor any other property owner, could have enjoined the construction of the retaining wall sought by the Stevens based upon public or private nuisance, as its development was completely within the zoning and building ordinances of the City of Cannon Beach, but for the absolute prohibition of Goal 18, adopted in 1985, twenty-eight years after

the Stevens purchase of the parcel in question. The enunciation of the new rule of ancient custom as the foundation for the public's recreational rights to the dry sand beaches came by "decree" 12 years after the Stevens purchased the subject property with a view toward development in cooperation with their adjacent property owner. Therefore, if Thornton is given retroactive effect, it amounts to a taking of private property without compensation under the Lucas holding. If Thornton is not given retroactive effect to property owners owning the dry sand portion of the beach prior to Thornton it does not constitute a taking.

This honorable Court has not been required to consider the Chevron criteria of limiting Thornton solely to prospective application. It must do so now in light of Lucas, supra. In so doing, this Court

should be guided by the reasoning in American Trucking Association v. Smith, supra, and McKesson v. Div. of Alcohol of Florida, supra. In those cases the Supreme Court determined that where a new rule of law is established which overturns an unconstitutional law or unconstitutional application thereof, the due process clause of the Fourteenth Amendment requires fullest relief from the unconstitutional exactions or proscriptions unless the case establishing the new law is limited to prospective application, as was the ruling in American Trucking Assn., supra. Clearly, a prospective application of Thornton, as broadly read as the Court of Appeals reads it, avoids the obvious unconstitutional taking of dry sand property of pre-Thornton owners and also avoids the lack of due process argument available to such owners.

This honorable Court should now decide this issue.

3. THE COURT OF APPEALS ERRED IN IMPLYING THAT LUCUS DEFERS TO STATE PROPERTY OR NUISANCE LAW RETROACTIVELY APPLIED.

The Court of Appeals stated, "The [Lucus] opinion makes it clear that that issue [the proscribed use burdened owner's title to begin with] is to be decided under the 'State's law of property and nuisance.'" (Opinion, p. 3) Lucus made clear that a "'state by ipse dixit, may not transform private property into public property without compensation, . . .'" Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)." (120 L.Ed.2d at 823) Instead, as it would be required to do if it sought to restrain Lucus in a common law

action for public nuisance:

" . . . South Carolina must identify background principals of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the state fairly claims that in proscribing all such beneficial uses, the Beach Front Management Act is taking nothing." (120 L.Ed.2d at 823)

No one has claimed that, prior to Thornton, persons owning dry sand thought they could not develop portions thereof to the exclusion of the public except Justice Goodwin in his unsupported statement:

" . . . [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede." (254 Or. at 588)

In fact, as the Stevens brief points out (App Br. pp 17-31), the legal history

concerning the beaches is that the State has only claimed title to the foreshore or "wet sand area" (the land between high tide and low tide) since 1899 when the Legislature declared the wet sands of Clatsop County were a public highway. That wet sand "highway" was extended to the remainder of Oregon's beaches in 1913 except where the State had earlier transferred said land to private ownership. (General Laws of Oregon, Ch. 47, 1913) By 1947, the State had sold 119 of the 250 useable miles of the wet sand to private owners or 47 percent of the wet sands of Oregon. Thus, the State did not perceive some inchoate recreational servitude, or how could it sell 47 percent of the wet sand to private ownership.

In addition, Justice Goodwin, in 1969 inexplicably forgot that in 1968 an initiative petition was voted on by

Oregonians to amend the constitution of this State to establish a procedure whereby upland owners claiming dry sand ownership could make claim to their dry sand by suit or action within one year of the initiative petitions becoming a part of the Oregon Constitution. The petition was defeated 464,140 "no" to 315,175 "yes". Thus, 315,175 Oregonians feared that dry sand owners had the right to exclude the public unless barred by a one year claim period for that right to be purchased by the State through bond revenues. Further, since 1917, the predecessors in title of the Stevens and their neighbors to the north have encroached upon the dry sands of Cannon Beach without complaint by any person, public or private.

When it is remembered that the Thornton court adopted the doctrine of ancient custom sua sponte without the benefit of any

briefing on the applicability of ancient custom to the land in question, it is understandable that the court's factual premises were faulty. Stevens respectfully submit that their estate in the dry sand included the later proscribed interest of some economic development when they purchased the property in 1957 for purposes of development in conjunction with the adjacent motel. Thornton cannot decree, ipse dixit, the abolition of the fundamental right to exclude the public in 1969 without requiring compensation for prior owners of property affected, such as the Stevens. See Lucus, 120 L.Ed2d 821-822; and see Nollan v. California Coastal Commission, 483 U.S. at 831, 107 S.Ct. at 3145-3146, 97 L.Ed.2d at 685 (1987).

4. THE COURT OF APPEALS MISCONSTRUED ITS ROLE AS NOT ENCOMPASSING THE POWER TO LIMIT THORNTON SO AS TO BE CONSISTENT WITH THE STATE'S OWN POLICIES OF BEACH DEVELOPMENT AND SO AS NOT TO IMPLIEDLY REPEAL ORS 390.650 (THE DEVELOPMENT COMPONENT OF THE BEACH BILL.)

All courts are empowered to interpret a prior decision so that the prior decision remains consistent with other statutory and common laws of the state. See: Salem College & Academy, Inc. v. Employment Division, 298 Or. 471, 695 P.2d 25 (1985). The Court of Appeals adopted the trial court's interpretation that Thornton abolished all right to economic use of the dry sand that would exclude the public from a portion thereof, as pressed by the State herein. It did so without considering the

three legally incongruent effects that the expansionists reading of Thornton causes.

The first incongruence is the Court of Appeals' expanded reading of Thornton is contrary to the recent holding in Lucus, supra. See Argument at III 1 above.

The second inconsistency is that in 1967 the Oregon Legislature adopted what is now ORS 390.650-655 (the portion of the Beach Bill that provides for improvements of the dry sand by owners thereof).<sup>1</sup> Clearly,

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<sup>1</sup> Whereas ORS 390.650:

"(1) Any person who desires a permit to make an improvement on any property subject to ORS 390.640 shall apply in writing to the State Parks and Recreation Department on a form and in a manner prescribed by the Department stating the kind of and reason for the improvement.

The standards for considering a requested improvement by a dry sand owner are:

"(1) The public need for healthful, safe,

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if Thornton precludes all development, as Goal 18 does<sup>2</sup>, then the Beach Bill's

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esthetics surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources.

"(2) The physical characteristics or the changes in the physical characteristics of the area and suitability of the area for particular uses and improvements.

"(3) The land uses, including public recreational use, if any, the improvements in the area, and trends in land uses and improvements, the density of development and the property values in the area.

"(4) The need for recreational and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area." (ORS 390.655.)

<sup>2</sup> LCDC Goal 18 - Beaches and Dunes.

"Implementation Requirements

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development component has been repealed by implication. No implied repealer of the Beach Bill's development component has been acknowledged by the Parks and Recreation Department in the 23 years since Thornton, and the Department is still administering improvement applications and granting them! The Attorney General's expansionist reading of Thornton as precluding all improvement of the dry sand is at odds with the Beach Bill statute and its present day administration by the Parks and Recreation Department. The State cannot have it both ways, which is the

...

(2) Local governments and state and federal agencies shall prohibit residential developments and commercial and industrial buildings on beaches, active fore-dunes, and on other fore-dunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping, and on interdune areas (deflation plains) that are subject to ocean flooding. . . ." R-5

anomalous effect of reading Thornton as extinguishing all economic use of the dry sand by its private owners, yet the State's granting such development powers to private owners on the dry sand.

The third inconsistency is that the Kyllos Restaurant is presently being built on the dry sand, albeit east of the statutory zone line, in Lincoln City. If Thornton precludes — exclusive private development on the dry sand, it applies to the dry sand "lying between the line of mean high tide and the visible line of vegetation." (Thornton, supra, at 586.) Thus, the Kyllos Restaurant is proscribed by Thornton, as the Court of Appeals now interprets it, yet the State is utterly moribund in preventing the development of this private restaurant on the dry sand, which restaurant will exclude nonpatrons.

This issue was raised in oral argument before the Court of Appeals, yet the Court's Opinion does not mention the incongruence of Thornton's abolition of private exclusive development when just such a development is currently taking place several miles south of the Stevens' property. This Court has the task of squaring the Court of Appeals decision with an inconsistent statute and state policy or the present case presents another thorny constitutional issue, i.e., one of equal protection of the law provided by the Fourteenth Amendment to the U.S. Constitution.

5. THE COURT OF APPEALS ERRED IN FAILING TO DECIDE THE PROPRIETY OF THE TRIAL COURT'S DISMISSAL OF THE TAKING CLAIMS ON A RULE 21(A)(8) MOTION, UPON WHICH NO EVIDENCE COULD BE ADDUCED TO SUPPORT THE FACIAL AND "AS APPLIED" TAKING CLAIMS.

The Supreme Court has often observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by an ordinance or statute depends largely upon the particular circumstances in each case. United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958). A Rule 21(A)(8) Motion precludes submission of evidence and historical documents in support of a claim. The Complaint and Amended Complaint adequately alleged a facial taking claim as well as "an applied" taking claim against Respondents, as the Complaint alleged a total prohibition of development under LCDC Goal 18 and the City's ADBO zoning. Since Nollan, supra, a permanent physical occupation occurs for the purpose of proving an unconstitutional taking where

individuals are given a permanent and continuous right to pass to and fro so that the real property may continuously be transversed, even though no particular individual is permitted to station himself permanently upon the premises. (Nollan, supra, U.S at 831-832, 107 S.Ct at 3145, 97 L.Ed. at 685-686.) Such a physical occupation is a per se taking which requires compensation irrespective of the social benefit achieved by that taking and the minimal nature of the intrusion. Loretto v. Teleprompter Manhattan CATV Corp, supra. If this case was to be dismissed, it should have been dismissed on a summary judgment motion so that the material set forth in plaintiff's brief to the Court of Appeals could be utilized and additional evidence could have been offered in the form of Affidavits.

Et seq.

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BEFORE THE SUPREME COURT  
FOR THE STATE OF OREGON

IRVING and	)	
JEANETTE STEVENS,	)	
	)	
Petitioners,	)	Case No. S39585
vs.	)	
	)	
CITY OF	)	
CANNON BEACH and	)	ORAL ARGUMENT
STATE OF OREGON,	)	
DEPARTMENT OF PARKS	)	
& RECREATION,	)	
	)	
Respondents.	)	

TRANSCRIPT ON APPEAL

BE IT REMEMBERED That the above-entitled matter came on regularly for hearing before Supreme Court, Salem, Oregon, on March 3, 1993, and the following represents a transcript of the electronically recorded proceedings of said matter.

APPEARANCES OF COUNSEL

GARRY McMURRY

Attorney at Law appearing for the  
Petitioner

MICHAEL REYNOLDS

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THE COURT: Today, the first case, we have some lawyers -- I realize it's only two blocks away from where they otherwise would have gone -- but I do appreciate the lawyers. Garry McMurry is appearing on behalf of the petitioner in the first case, and he's a Portland lawyer, and he's had a long-time practice in Portland, and appearing for the state and the Department of -- state of Oregon, Department of Parks and Recreation, Respondents, Mike Reynolds, who has been a senior member of the Attorney's General Office for a member of years.

Thank you both for your willingness to come over here, and with that introduction, Mr. McMurry.

MR. McMURRY: May it please the Court and learned Counsel. Garry McMurry, appearing for petitioners on review, Irving and Jeanette Stevens.

There are three fundamental reasons why the Court of Appeals' decision must be reversed. First, the Attorney General has consistently argued in this case that Thornton precludes all development on the dry sand portion of Oregon beaches. But the Attorney General's client, the Parks and Recreation Department and its predecessor, the Department of Transportation, allowed development on the dry sand portions of the Oregon beaches in at least three instances: one, Driftwood Shores in Florence; two, the Inn at Spanish Head, just south of Lincoln City,

and most recently, in 1992, the building of the Kyllos Restaurant, adjacent to the Dee River in Lincoln City.

We've taken the overflights, 1978 overflights, which are done by the Department of Transportation in the mapping and topography of the Oregon beaches. We show you here an overflight that was blown up and a registered engineer has interposed the zone line as it actually is, (indiscernible) Beach Bill zone line.

You can see from this photograph that the western face of the hotel at the Inn at Spanish Head is west of the zone line on the dry sand as is the entirety of the southwest vantage of the hotel, all the decking and all the pools. So that is

the fact on the ground that can be determined by, not only this photograph, but the actual view of the hotel itself.

THE COURT: Mr. McMurry, why isn't the response -- why isn't the response to that argument simply because an agency of the state has not done its job in protecting the public's interest is no reason to permit your client to violate the public interest recognized in Thornton?

MR. McMURRY: There are two reasons why that would not be the sound position, Your Honor. The first is that this shows that the agency interprets Thornton as not barring all development. We must not assume that an agency willfully violates the law. It merely shows that the agency

vested with the control of development takes a different view than the lawyers who represent them.

The second reason is --

THE COURT: Before you go to that, I'd like to test that reason by an additional question, Mr. McMurry, if I could. Leaving aside the administrative interpretation in these three given cases in whatever it is, 300 miles of beach, I'm curious about whether these -- especially the Inn at Spanish Head -- does that interfere with any access of the public to the dry sand beach? Does this picture interfere with any access of the public to the wet sand by going over the dry sand?

MR. McMURRY: Yes. Obviously -- obviously you can't traverse the cliff

side Inn at Spanish Head --

THE COURT: (Indiscernible).

MR. McMURRY: -- (indiscernible) to get to wet sand. So the effect that there has been an enclosure of that space, then there has been an intrusion into the unfettered flow of pedestrians on the dry sand.

THE COURT: I thought it would have been a little hard to get down to the beach at the inn, so that's why I asked the question.

MR. McMURRY: I think that's correct.

THE COURT: Let me work with that just a minute longer to be sure. Would you tell me the facts of your client's position. Does your client intend to

allow the public to cross over without  
fetter?

MR. McMURRY: No.

THE COURT: Thank you.

MR. McMURRY: Correct.

THE COURT: Excuse me, Mr. McMurry,  
does timing play any relevant --

MR. McMURRY: I'm sorry?

THE COURT: The timing. For  
instance, if the Inn at Spanish Head was  
started in, I guess, in 1968, and the  
Beach Bill was passed in 1969 --

MR. McMURRY: '67.

THE COURT: -- '67, does that have  
any relevance as to the timing, or would  
you say the interpretation (indiscernible)  
or was the Inn at Spanish Head following  
the Beach Bill?

MR. McMURRY: It was following the  
Beach Bill, yes.

THE COURT: Are you going to get  
back to his question? And then I have a  
question, a procedural question.

MR. McMURRY: Yes, I wanted to give  
the second answer to that. This is no  
grounds -- because the agency has goofed,  
this is no grounds to continue that.

I suggest to you that Thornton  
cannot be read, as a matter of law, or as  
a matter of fact, as the AG has  
enunciated. And I'll get into that a  
little bit in greater detail.

THE COURT: Mr. McMurry?

MR. McMURRY: Yes.

THE COURT: This case comes to us  
on an appeal of the trial court granting a

motion to dismiss, is that right?

MR. McMURRY: Yes, 21(A)(8).

THE COURT: Is this document that you're showing us in the record?

MR. McMURRY: No, it is not, Your Honor, and could not have been.

THE COURT: Also, all these comments about Spanish Head and all these other places. We don't know anything about that, do we?

MR. McMURRY: No, but I'm --

THE COURT: Is it proper to argue about what this department has done elsewhere when we're simply considering whether your complaint states facts sufficient to constitute a claim?

MR. McMURRY: Yes, Your Honor, under Rule of Evidence 201(A)(2)(f) any

fact that is readily ascertainable from the public record -- these are all documents taken from the Department of Transportation and it's a fact in existence that's readily ascertainable -- and the precise --

THE COURT: You're telling me that in ruling on a motion to dismiss you can consider facts other than those that are contained on the face of the complaint?

MR. McMURRY: I say that physical facts, this Court can take judicial notice of them.

THE COURT: Mr. --

MR. McMURRY: In the argument.

THE COURT: Actually what you're referring to is not Rule 201. It's the judicial notice of legislative facts.

That is to help us determine what the law is or ought to be. 201 gives adjudicated facts. This is not an adjudicated fact.

MR. McMURRY: All right, it would be 202, then.

THE COURT: No, not 202. Just judicial notice of legislative facts. There's no rule on it. What you're doing is trying to give us facts like a Brandies Brief (indiscernible).

MR. McMURRY: Right. Correct.

THE COURT: Well, that may be what its purpose is, Mr. McMurry, but I, for one, am not the least bit interested in having you tell me where lines are drawn on the sand. I want to know whether your complaint states cause of action. That's what this case is about and as far as I'm

concerned that's all this Court ought to answer.

MR. McMURRY: Very well, Your Honor.

THE COURT: I'm the only -- maybe the only one that feels that way, so you do as you please -- but I'm just going to warn you that as far as I'm concerned you're taking time away from what matters.

MR. McMURRY: All right, I don't want to take any more time. I just want to show you what in fact existed --

THE COURT: I don't want to accept your representations as to in fact exists, Mr. McMurry. As far as I'm concerned it's a matter for proof, and this is not a case involving evidence.

MR. McMURRY: I was hoping that the others would.

THE COURT: All right.

MR. McMURRY: Let me go to the second ground why the interpretation of the Attorney General as to the meaning of Thornton is improper. To accept the argument requires the repeal, implied repeal, of the Oregon Beach Bill development component, ORS 390.655. Now, I think that the Attorney General, in order to avoid that implied repeal, has changed its argument.

If you'll look at page 6 -- I'm sorry, footnote 6 at page 10 of the Attorney General's Response to Petition for Review, you'll find that the Attorney General now says, ellipses, quote, "...the

Beach Bill arguably gives back to dry sand property owners some ability to place development on the dry sand, provided they mitigate the interference such development would cause to the public access rights on the dry sand."

I think that footnote puts the -- puts the Attorney General in a position identical to the petitioner's, that Thornton is not an absolute bar to development on the dry sand and thereby avoid the implied repealer of ORS 390.655.

With that aside, the second reason why Thornton cannot be interpreted as the Attorney General and now the Court of Appeal has stated as a total ban to development on the dry sand is that it collides directly with Lucas v. South

Carolina Coastal Council. You'll remember that the Stevens bought this property in 1957, 12 years before Thornton. Under Lucas a per --

THE COURT: But the theory of Thornton is that the first title from the common ownership of the public represented by the federal government, the first title from that common ownership, flowed out from the federal government impaired or holding back in the common ownership in the ability to cross the sand to get to the ocean. Now, that bill may be even wrong, because I didn't read Thornton before I came this morning, but that would be right back before, maybe in the 1800's, maybe 1855 when some federal land act was passed that encouraged homesteading or

sale at \$5 an acre or something --

MR. McMURRY: 1850, and the patent was issued in 1893. So that is correct. But clearly --

THE COURT: So I'm saying -- you're saying they bought it, and the question is what did they buy if the public always owned it?

MR. McMURRY: Right, right. Because the doctrine of custom or prescription cannot run against the federal government. And I'll get to that because what the Court in Lucas said was a per se taking, i.e., a physical invasion or regulation that deprives the owner of all viable economic use is a per se taking and must be compensated unless -- unless the regulation or decree is founded upon

principles that are well-understood that inform property and nuisance law of the state.

Now, obviously, the Attorney General argues that Thornton was merely enunciating a well understood rule that had existed in the Oregon law since territorial days, and that is their argument. That position is wrong for a number of reasons. The fact is that in the territorial government of Oregon no settler could obtain title to the land. There was no land tenured system under the Oregon Territory. In fact, in 1848, Congress passed a law that said all laws heretofore passed in said territory making grants of land or encumbrances to lands are declared void. That's set forth in

Shivley v. Bowlby, 152 at page 50.

THE COURT: To be sure I understand what you're telling me that the territorial government and the territorial legislature couldn't grant the land --

MR. McMURRY: Right.

THE COURT: -- but I was talking about the federal land grant legislation that tracked the Northwest ordinance and bills.

MR. McMURRY: Right, that was passed in 1850, and that set up the first -- the first surveying of the Oregon Territory by sections, quarter sections, et cetera, and set up the patent procedure by which homesteaders could claim lands. The patent in the property in question was issued in 1893. Now, obviously, upon

statehood in 1859, the Oregon -- Oregon adopted a constitution. But in the admission act itself, the federal admission act of 1859, Congress stated the following: quote, "The people of Oregon shall provide by an ordinance, irrevocable without consent of the United states, that said state shall never interfere with the primary disposal of the soil to bona fide purchasers thereof."

Now, there's a case law that goes back a century that says no cloud on the title exists on federal land that is patented to a bona fide purchaser unless claim is made by the state or any third party. Clean, clear title, unencumbered title, passes by act.

Obviously in this case the state of Oregon made no claim as to any sort of recreational servitude of any kind, and there is no reference in the patent on any patent that affects the Oregon beaches. Consequently, as a result of that as a matter of law, if custom did exist, it only came into play in 1893 as a matter of law.

THE COURT: The ability to acquire, prescriptive through customs, is that what you're saying?

MR. McMURRY: Prescription or custom, right.

THE COURT: Okay.

MR. McMURRY: Stevens' predecessor built the first retaining wall in 1917, 24 years after the property had been

obtained.

THE COURT: Mr. McMurry, I hate to be overtechnical. Is this in your pleadings?

MR. McMURRY: The date of building?

THE COURT: No, is your pleading about -- retains the historical facts regarding the --

MR. McMURRY: I don't know that it's in the complaint. I don't think we put in a date that it was first built. But it's in the briefs from --

THE COURT: Well, I'm -- I certainly want you to try your case, but I am bothered by the rule. It seems to me that we're going to be limited by what the pleadings say.

MR. McMURRY: All right.

THE COURT: That's at least what I'm supposed to try this case upon.

MR. McMURRY: All right. Thornton was the very first decision in Oregon recognizing that custom could transfer property interest and rights. It was not a well-settled principle, and Justice Goodwin so advised and so stated. This is a new enunciation. And we think, and we think in the briefs between pages 19 and 31, we established that had there been briefing and a thorough understanding, five of the seven elements of custom are lacking as a matter of fact, as a matter of social and political and legal history.

The third reason -- the third reason why this --

THE COURT: Mr. McMurry, I think it's obvious that this is true, but I just want to be sure that -- you're asking us to overrule the decision that was made in 1969 about public access to the beaches, the Supreme Court decision?

MR. McMURRY: No, I'm asking you to limit it to its holding that the state has the power to regulate the use of the dry sand area but not the power to destroy any economic utilization of the land.

THE COURT: That's why I asked you if your client intended to fetter the passage of the public over the dry sand to get to the ocean, and you said yes.

MR. McMURRY: Yes.

THE COURT: Okay.

MR. McMURRY: Yes, there's going to be a retaining wall built and a motel built on the 106 feet by 65-foot piece of property in question in this case.

THE COURT: You say regulate, and I'm saying if they're in the way, that -- you know --

MR. McMURRY: But there's no --

THE COURT: You do understand why I'm asking the question?

MR. McMURRY: Yes, of course I do.

THE COURT: Okay.

MR. McMURRY: But there's no economic use that could be made of the land if you can't -- if you can't affect the right of the public to walk to and from upon it. The third reason why --

THE COURT: You only want to affect it?

MR. McMURRY: I'm sorry?

THE COURT: Your complaint only asks to affect it, or does it ask to exclude?

MR. McMURRY: It asks to exclude.

THE COURT: Okay.

MR. McMURRY: To do the same as Kyllos Restaurant.

MR. McMURRY: The third reason that the Court of Appeals decision cannot stand is because Lucas states absolutely emphatically that a "state by ipse dixit may not transform private property into public property without compensation. Instead, as it would be required to do if it sought to restrain Lucas in a common

law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibits the uses he now intends in the circumstances in which the property is presently found."

The Court also stated, "A law or decree with such an effect as a per se taking must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners or other uniquely affected persons under the state's law of private nuisance or by the state under its complementary power to abate nuisances that affect the public generally or otherwise."

THE COURT: Before you go on with that, would you tell me what the complaint said your grounds for relief is? You stated them.

MR. McMURRY: Yes, there were two defendants and there were two claims for relief: one, an applied taking as it related to the land in question, and, two, that Goal 18 established a facial taking as a matter of law.

THE COURT: Forgetting that Goal 18 for a minute, the implied taking would have occurred when? When the legislature passed the Beach Bill in 1967?

MR. McMURRY: No, the taking occurred when the various divisions that had review of this, Parks and Recs, the Division of State Lands, and the City of

Cannon Beach all denied the permit based in part upon Goal 18, the absolute denial or prohibition of any development upon the beaches or dunes of Oregon. Any.

THE COURT: Again, that -- some of that relates back to Goal 18.

MR. McMURRY: Right.

THE COURT: I'm sure that, having thought about the case, you know what you've intended for it. Shouldn't your client or the predecessor -- they've owned it since '57, you say?

MR. McMURRY: 1957.

THE COURT: Shouldn't they have done something to deny the public's taking when it occurred by the passage of the Beach Bill? Have they let the statute run?

MR. McMURRY: No. No, because the Beach Bill does not -- does not preclude building. The Beach Bill explicitly allows development of the property. ORS 390.655.

THE COURT: As long as people can pass over it?

MR. McMURRY: No. No. It explicitly allows -- it's a --

THE COURT: So your answer is it didn't really take?

MR. McMURRY: That's right?

THE COURT: Mr. McMurry, a factual question: In your complaint you allege that most of your -- most of the plaintiff's land falls within the active dune and beach overlay zone established by the Cannon Beach ordinance. Does your

complaint -- anyplace in your complaint do you tell us where that piece of land falls insofar as the Beach Bill, as the land described in the Beach Bill is concerned?

MR. McMURRY: Yes, Your Honor, there are two separate tax lots. One, Tax Lot 8500 is east of the zone line and the other is west of the zone line. In other words, the visible line of vegetation separates the two tax lots. And we describe it.

THE COURT: Okay, and the visible line of vegetation is the dividing line as far as the Beach Bill's concerned?

MR. McMURRY: That's right.

THE COURT: So a person can tell by looking at the complaint then that a portion of your land, then, is within --

is within the Beach Bill area and a portion is not.

MR. McMURRY: Right.

THE COURT: How are we going to decide -- well, then -- I really am thinking aloud here -- but the Beach Bill has no effect, then, upon the use of your land that's outside the Beach Bill area.

MR. McMURRY: That's correct. We didn't file the case on the basis of the Beach Bill violated our rights. We depend upon the Beach Bill for our rights. It's Goal 18.

THE COURT: And the city ordinance.

MR. McMURRY: That's right. That's right.

THE COURT: But don't you come within Lucas to be talking about a land

use planning, there still is the fact of the public assertion to the right. You're saying that was not a complete assertion, and I understand, but I guess I want to say there's still a fact of the public's assertion to the right?

MR. McMURRY: The difficulty with it is that the Attorney General argues that the retroactive application of Thornton does not do harm to the holding, explicit holding in Lucas. We respectfully disagree. We think that Lucas -- that Thornton cannot be applied retrospectively or retroactively to property that was held prior to that decision and was bought for the purpose of economic development. And we think that to so hold --

THE COURT: Excuse me, you don't mean that second thought. It was property that's held for economic development; it doesn't matter what it was held for.

MR. McMURRY: That's correct.

THE COURT: Leave that out.

MR. McMURRY: That's correct. And this case specifically satisfies the jurisprudence of retroactivity, when it's to be applied and when it's not. Thornton decided an issue of first impression, number one. Secondly, the retrospective application of this rule will retard its effect because we think that it will be struck down as a taking and a taking without due process of law because it should not be applied to property owners who held the property prior to the

decision in Thornton.

THE COURT: Let me stop you for a second, Mr. McMurry. If that's true, why wasn't McDonald v. Halvorson decided on that basis? I mean, that would have been the first door out, and it would have taken two pages to decide the case.

MR. McMURRY: No, because the Court -- we argued to the Court that the Beach Bill did not apply in any way, and Thornton didn't apply because it wasn't beach. And that was the factual quick way to get that case disposed of.

THE COURT: Well, I'm glad you think it was quick.

MR. McMURRY: I'm sorry I said that. I really am. My time is up.

THE COURT: Thank you, Mr. McMurry.  
Mr. Reynolds.

MR. REYNOLDS: May it please the Court. I'd like at the beginning to, perhaps, clarify where we are and simplify, hopefully, the arguments that we have on why we believe that the plaintiffs' argument that they've presented to this Court have no merit.

At bottom this is a very straightforward and uncomplicated case. The plaintiffs' complaint at the Court of Appeals expanded the meaning of the Court's decision in Thornton v. Hay when the Court concluded that plaintiffs could not place any structures on their dry sand lot. Yet Thornton clearly says that the owner of a dry sand lot may not construct

obstacles that interfere with the public's right of access, the public's easement, recreational easement over the dry sand area.

Plaintiffs complain that if Thornton means what the Court of Appeals has said then Thornton's in fact a taking of their property which is requiring compensation. Yet recent Supreme Court decisions make it clear that when a state merely applies its existing property law to a particular factual situation that no taking results.

I'd like to address both of those arguments in more detail and respond to a couple of the points that Mr. McMurry has raised here. Before I do --

THE COURT: Mr. Reynolds, let me stop you. You've left out one piece of Mr. McMurry's argument as I understand it, and that additional piece is that Oregon law -- Oregon property law, whatever other states' property law might be -- Oregon property law cannot permissibly have included a public easement, whether derived from prescription or from custom, over the property in question because, to do so, would be to say that there was a cloud on the title from the time the patent for that land was issued in the 1890's and such a cloud on title was not permissible under the Oregon Admission Act. That is to say that the state's granting of title of any property is given to the state under the admission act had

to be free and clear unless such cloud upon the title was disclosed at the time.

So I want to be complete about it. I think that was a piece of his argument.

MR. REYNOLDS: Well, that's a piece of his argument that he makes here today for the first time. That's not contained in any of the briefs that you can see before you. But I would like to address that, and if I forget, when I'm done --

THE COURT: I'll remind you.

MR. REYNOLDS: -- please remind me to come back to it, thank you.

MR. REYNOLDS: There's some discussion here about Thornton and the Beach Bill, and I want to get to that perhaps right at the beginning and hopefully if the Court has any questions

about the interrelationship we can get those resolved right now.

Thornton establishes sort of a baseline of the public's rights of access to the dry sand area. That is a right which the legislature in the Beach Bill has said is vested in the state of Oregon. But the Beach Bill is not the only regulatory provision that the state has adopted in response to the principles in Thornton. We also have the statewide planning goals, and Goal 18 in particular; that is a goal that was adopted by the Land Conservation and Development Commission through authority delegated to it by the legislature.

So there are really two pieces of regulation that the Court has to keep in

mind when we're considering this. One is Goal 18 which bans all residential developments and commercial and industrial buildings on active foredunes; the second is the Beach Bill which, with respect to other portions of the dry sand area, does permit some development.

Now, it's our position, and I don't think there's any question about it, that the rights that the public have vested in them as a result of Thornton v. Hay is a right which the legislature may control on behalf of the public, and certainly the legislature can give back a little bit of what Thornton has said is the right that adheres in the public. So there simply isn't a conflict here.

THE COURT: Would you tell me again, what is the right the public has under Thornton?

MR. REYNOLDS: The right the public has under Thornton, Your Honor, is the right of -- this Court has characterized it as a recreational easement, public right of access for recreational purposes on the dry sand area with which private property owners may not interfere.

THE COURT: And is the words "dry sand area," are those words of art?

MR. REYNOLDS: Those are words that refer, Your Honor, to the area between the mean high tide and the vegetation line.

In essence, above the wet sand --

THE COURT: The permanent vegetation.

MR. REYNOLDS: Above the wet sand to the permanent line of vegetation.

THE COURT: And does the complaint in this case tell us what land -- where the land that's involved in this case lies with respect to the dry sand area as you've just defined it?

MR. REYNOLDS: What it does, Your Honor, there is an attachment to the complaint as an exhibit, that does have a map of the property. I think it has the statutory vegetation line drawn on that. I'm not sure what the exhibit number --

THE COURT: The so-called meander line?

MR. REYNOLDS: Well, this is the statutorily drawn -- the statutorily drawn line of permanent vegetation. And it

shows that --

THE COURT: You're talking about the metes and bounds descriptions in the -

MR. REYNOLDS: I believe so.

THE COURT: Okay.

MR. REYNOLDS: And it shows that at least the front lot, the seaward lot of the two lots the plaintiffs own, I think are pretty much entirely seaward of that vegetation line. But I don't believe it does answer the Goal 18 question of whether this is an active foredune.

Again, to back up for just a moment. The plaintiffs alleged in their complaint that Goal 18 -- as a result of Goal 18, the beaches and dunes goal as well as the City's comprehensive plan, but

primarily the beaches and dunes goal, this denial of development -- or that goal on its face and as applied to their property prevented them from being able to develop their property. I don't believe there, other than their allegation that the goal applies to their property, I don't believe there's any factual information in the record that actually shows this is an active foredune. But I think for purposes of the motion to dismiss, it was assumed that their property is subject to Goal 18.

THE COURT: That's an appropriate assumption, isn't it? That is to say if their allegations would permit the offer of evidence to demonstrate that there's a foredune area in it, then that's sufficient to get past the motion to

dismiss, is it not?

MR. REYNOLDS: That would be our position.

Are there any other questions about -- I think -- I mean, that kind of answers one of their questions, I think, which is that Thornton -- that the state is taking an inconsistent position here with respect to Thornton v. Hay and the Beach Bill in the sense that we are taking the position that Thornton effects a total ban on development. We think Thornton does establish the right of the public to be free of any kind of development that interferes with their right of access. The fact that the state has perhaps given something back under the Beach Bill while at the same time maintaining fairly severe

regulations with respect to development on the active foredune under Goal 18 is not an inconsistency. It's a power that the state has as a guardian of the public's easement.

THE COURT: Could you tell me what type of improvement could be constructed on property such as this without interfering with one's right -- the public's right of access?

MR. REYNOLDS: That is -- Justice Peterson, that's pretty much a factual question. I guess that we're --

THE COURT: Give me an example of one thing that could be built or constructed or placed on this without interfering with the public's right of access?

MR. REYNOLDS: Well, I'm not sure -  
 - I'm not sure as a factual matter that there is anything. We took the position below in the trial court that there was no facial taking under Goal 18 because Goal 18 does permit some development. All Goal 18 does prohibit outright are residential developments, commercial and industrial buildings. I'm not a building expert, and we haven't had any factual information to develop what else is left, but the goal does refer to other developments being permitted, provided certain conditions are met.

So I'm assuming the answer is there are some developments that could still be allowed on the active foredune. But they can't be commercial and industrial

buildings or residential developments.

THE COURT: Would Goal 18 permit the erection of a wall or a support for a building that was further inland providing that the wall or support did not materially interfere with the public's access to the beach?

MR. REYNOLDS: I believe Goal 18 has provisions providing for sea walls under certain circumstances as does the Beach Bill.

THE COURT: So if there was evidence from a hydrologist or an engineering geologist that said it was necessary in order to secure buildings that were behind the active dune line, Goal 18 would not outright forbid such erection?

MR. REYNOLDS: So long as the development -- may I qualify -- so long as the development is already there.

THE COURT: Right.

MR. REYNOLDS: Now, if the sea wall were necessary to permit a --

THE COURT: A new --

MR. REYNOLDS: -- backfilling and a new development, I'm -- it might depend on whether that development were on an active foredune or a portion of it or whether it was on the upland.

In 1969 this Court dusted off and applied a principle of property law that was rooted in the common law that secured for present and future generations recreational access rights to the dry sand area of Oregon beaches. In Thornton v.

Hay this Court applied the common law doctrine of custom, and it held that the public, through its long and continuous usage of the dry sand area on the Oregon beaches, had acquired the right to recreate on that dry sand. This was a right of which private property owners could not interfere.

This Court in the State Highway Commission v. Fultz decision has referred to that right as a recreational easement. And I think that's a fair characterization of the term inasmuch as it involves an interest in land that's held by the public, and it certainly is an interest which burdens the servient estate of the dry sand owners.

The Court of Appeals in this case applied the Thornton decision. The Court assumed that statewide planning Goal 18 denied the plaintiffs the ability to develop their dry sand lots in Cannon Beach and that without development the lots could not be put to any economically beneficial use. So the assumption of no economically beneficial use as a result of the ban on development I think was made clearly by the Court of Appeals.

But the Court then held that denying plaintiffs the ability to develop their lots did not constitute a taking entitling the plaintiffs to compensation. To amount to a taking, Goal 18 would have to deprive the plaintiffs of a property interest.

The interest at issue here that we're talking about are development rights. In light of the public's recreational easement, plaintiffs' property rights simply do not include development rights, at least development rights that would interfere with the public's right to access the dry sand area. Without property interest that include development rights, a regulation that prohibited development could not amount to a taking.

Now, plaintiffs in their briefs, at least, made essentially two arguments in response to the Court's decision. First they argued the Court of Appeals had expanded the meaning of Thornton to say that property owners have no right to

develop their dry sand property if it interferes with the public's access right to the dry sand area.

Plaintiffs contend that Thornton should not be construed to prohibit all development to allow some economically beneficial use to their property even though some economically beneficial use would interfere with the public's access rights to dry sand.

Secondly, they argue that the Court of Appeals interpretation of Thornton constitutes a taking under the United States Supreme Court's most recent decision in Lucas vs. South Carolina Coastal Commission. Plaintiffs argue that under that decision Thornton effects both a development ban which results in a

deprivation of any economically beneficial use as well as a physical invasion of their property. Both of those effects are results which Lucas, they contend, says constitute a taking.

We think our answers to their arguments are fairly straightforward. First the Court of Appeals, we submit, properly interpreted and applied the Thornton decision. I mentioned this before but I feel I need to reiterate it. In Thornton the Court said that the private dry sand owners have no right to interfere with the public access to the dry sand area through the construction of fences or other obstacles.

Here the plaintiffs propose to construct a sea wall, approximately 100

feet in length, and then backfill that sea wall that would have the effect of eliminating 12,500 square feet, approximately, of dry sand area.

THE COURT: You say "have the effect of eliminating." Why?

MR. REYNOLDS: Because the public would not have access to that area once the sea wall were built and it was backfilled.

THE COURT: Well, wouldn't that depend on how they build it?

MR. REYNOLDS: Well, that was their intent was to eliminate --

THE COURT: He confirms that it doesn't it, in effect, that what he's seeking is no crossover.

MR. REYNOLDS: Right. I don't think they were planning --

THE COURT: Right, when you say you can't build a sea wall that preserves the access, I just don't feel that's right.

MR. REYNOLDS: Oh, you could, but I don't think they were planning on any stairs, Your Honor, that would go up the sea wall that would permit the public to sunbathe on the top of their sea wall.

THE COURT: The parties are in agreement that this is not designed to build a public sandbox?

MR. REYNOLDS: That's correct. This is intended to build a 30-unit motel.

Just to put this in perspective, we're talking roughly about one and a half times the size of a standard city lot,

12,500 square feet.

THE COURT: You're assuming that the sea wall is going to be entirely constructed within the dry sand area.

MR. REYNOLDS: That was agreed, yes, Your Honor. And that was evidence from that -- from -- the parties will all admit that it's also in evidence as a result of attachments to the complaint. At least for purposes of the motion to dismiss.

I don't think there's any question that a sea wall of that size with that kind of an effect is an obstacle that would interfere with the public's right to the dry sand area within the meaning of Thornton. There's simply no expanded meaning reading to the Thornton decision

to reach the result that the Court of Appeals reached in this case. It's clearly within the statement that Thornton made.

If anything, we think that plaintiffs' real argument here is that Thornton should be narrowed, not that the Court of Appeals expanded it, but that the Thornton should be narrowed so as not to apply if the effect of applying Thornton is to deprive a dry sand owner of all economically beneficial use of his property. In other words, instead of a flat prohibition on a dry sand owner's ability to interfere, that prohibition should only exist provided the dry sand owner is able to use the property for some economically beneficial use. So there

[End Side 1, Tape 1]... but this Court narrow the reach of Thornton.

We have several responses to that argument. First of all, there's no rule of property law that we're aware of that says a servient estate is burdened by an easement is entitled to retain some economically beneficial use with respect to the easement or with respect to the servient estate. In other words, the owner of the servient estate cannot alter the condition of that servient estate once the easement is created if to do so interferes with the exercise of the easement right.

In this case, the easement right was created when the lot at issue was bare of development. And what that principle,

as we understand it, means is that the servient estate is not entitled to develop the property in a way that interferes with the easement. I'm not aware of any cases that say that is not the law.

So to the extent that Thornton basically says that by saying there's no interference with the right of the easement by creating obstacles or other kinds of structures, it's consistent with general principles of property law that govern easements.

Secondly, we submit that there's no fundamental unfairness that's present in applying Thornton as it's stated. I mean, to say that a private dry sand owner is not in a position to be able to develop their property because of the acquisition

of an easement by the public through the application of the state's principle of property law is certainly no more unfair than to say that a person can lose all interest in their property through the principles of adverse possession.

Concededly here, the owner who has a piece of property that may have no economically beneficial use may not be in as good a position as someone who would like to be able to or are in the position to be able to develop their property, but I submit they're still in a position better than someone who has had their property taken away from them entirely by the principle of adverse possession.

THE COURT: Mr. Reynolds, that actually takes my thoughts back to where

Justice Gillette left off, and that is you talk about acquiring an easement. In States v. Wenn, was the easement acquired and how? I take it your basic point to be that there's no taking because they never had what is claimed was taken, or they did not have at the time of these events, what they're alleging has been taken. When did they stop having it?

MR. REYNOLDS: Well, the principle -- I know Mr. McMurry made some reference to Wenn -- I mean the territorial government could not patent -- issue patents for land and titles. Well, the state doesn't -- until the state acquired the land from the federal government, and only some of the land -- Section 16 and 36 in every township -- the

state had no ability to issue title to land anyway. We call it -- they were clearless is what the state did, but the federal government issued the patents to the land that were required by Oregonians unless they got it through the state as part of the school lands, the state's school lands.

I'm not sure -- Mr. McMurry says the federal government didn't start doing that until 1993 (sic). I'm not aware that that's when --

THE COURT: 1893.

MR. REYNOLDS: 1893. I'm not aware that that's when patents started being issued. But I don't think that matters because the point here is that we had a principle that we brought with us from the

common law that said that people can lose whatever interest they can acquire in property through application of a doctrine of custom, and that is a custom by -- an easement by custom. Easement by custom is different from easement by prescription only in the sense it refers to a place, and it's held by innumerable people, but it refers to a place as opposed to a prescriptive easement which is held by individuals, an individual or individuals, with respect to a place.

But that principle is part of the property law regardless of when people started acquiring their property. We submit it doesn't make any difference when people started acquiring title to their land. That principle of property law was

there in place and in essence burdened people's title when they acquired the property.

The same is true with respect to prescriptive easement. Under Mr. McMurry's theory, I would assume, no person could lose title by prescriptive easement either. Because it wasn't --

THE COURT: At least not with respect to the government.

MR. REYNOLDS: And I don't believe that's the law.

THE COURT: I notice that Mr. McMurry relied expressly on a congressional act of 1850, and I know that there are additional amendments to the acts that encourage homesteading and development of all of the west, some

(indiscernible) some others. But 1850's not the end of the story. It's certainly not the end of the story before 1870 which is when chain of title shows here as (indiscernible). That's all up in the air.

Your position is there as a principle in effect that had, by the time these people bought in '57 -- in 1957, a principle in effect which had ripened into a general public right to cross this sand by the time they bought it?

MR. REYNOLDS: The principle was in effect when title was acquired because it came from the common law. The principle that people -- that the public could acquire an easement through the long and continuous usage of the property, that was

in effect.

Prior to 1957, I think, under the Thornton, unless this Court is going to go back and reanalyze the basis for Thornton, under the Thornton decision, that easement, by custom, had been acquired by the public long before, at least as to the dry sand area that was not developed yet. I mean, the easement existed with respect to the entire dry sand area; it may be that some people, through development, encroached on that easement. It may be that they adversely possessed it back and took it back away from the public and no one objected for a period of time. And so at some point it becomes too late to object. I mean, you can gain easements and lose easements through use and through

nonuse.

But the point here is the principle was in effect. The principle of state property law was in effect. That is the principle that the state court applied in Thornton.

In reference to that, coming back to --

THE COURT: You talked about losing an easement if the people had once gained it. This is just an observation: If people seem to be the same as the sovereign in Oregon, which today (indiscernible) the same than others, but anyway, people seem to be the same as the sovereign in Oregon, and if the statute, adverse possession, doesn't run against the sovereign, then once the people

acquire the easement they wouldn't have lost it, would they?

MR. REYNOLDS: Well, I mean, they wouldn't lose it, but there may be encroachments on that that would prevent them from being able to reassert their right to the easement. For example, if someone in 1917 or 1920 built out onto the dry sand area and no citizens complained, the state didn't complain, and it existed there for 10 or 15 or 20 years, I don't think the state or the public could come back at that point and say -- and sue and say, "You need to tear down your building because it interferes with my -- with the public's easement."

I think the principle works both ways, but we're not talking here about

tearing down anything. We're talking about someone attempting to exercise their development rights with respect to the dry sand area where the easement does exist.

THE COURT: Mr. Reynolds, I can understand if he only wants a limited amount of beach.

THE COURT: Mr. Reynolds, is the principle you took at the outset with respect to the alleged inconsistency between Thornton v. Hay and the Beach Bill involve the proposition that this easement existing in favor of the public in general, not in favor of specific individuals, it is an easement which may be enforced by, protected by or relinquished by the legislature?

MR. REYNOLDS: That's correct.

THE COURT: Now, there's a hook in this question.

MR. REYNOLDS: I'm not surprised.

THE COURT: Just trying to let you know. If the legislature could give away the right which was recognized in Thornton v. Hay -- and I assume for purposes of this discussion that you're correct in your argument that the right has always existed. Thornton v. Hay didn't create something; it merely recognized something. But if that right is subject to being given away by the legislature through the democratic and legislative process, the right could be given away completely, could it not? That is, the legislature could decide that for public policy

reasons it was going to give up the public's right to beach access at particular places or would authorize it to be done for purposes of gaining revenue or for some other reason?

MR. REYNOLDS: I think -- I think the state would be, and I think the state has asserted the position to do that just like it could sell or give away any of the other state property with the exception of the lands that we hold under the public trust doctrine.

THE COURT: If it could do -- if the state could do that, and if an individual acquired -- if the original title holder acquired title from the state -- I'm not suggesting that's true in this case -- but if the individual title holder

acquired title from the state, how is one to know whether the state sold the whole bundle of rights or not?

MR. REYNOLDS: I think the answer to that is the property, the title here was not acquired from the state. The title here is acquired from the federal government through patent. That's how all land in Oregon, except the land that comes to the state through the admissions act and any other specific grants, is acquired.

THE COURT: That's my understanding too, but there's still a hook in the question.

MR. REYNOLDS: Okay.

THE COURT: If title, instead, was acquired originally from a federal patent,

did the federal government have the right to give away this public easement?

MR. REYNOLDS: Assuming it was in existence at the time?

THE COURT: Well, you have to assume it was in existence at the time.

MR. REYNOLDS: I don't believe I have to assume -- the easement was in existence at the time. The principle of property law that permitted the acquisition of the easement had to be in existence at the time. That principle was in effect. I'm not sure when the easement was acquired; sometime probably during the late 1800's, early 1900's. At least that's -- I don't think Thornton was saying in its discussion of all of the activity that occurred on the ocean

beaches -- was talking about pre-1893. It was talking about the activity that occurred during the late 1800's, early 1900's.

THE COURT: Well, I'm not sure that's the only way to read Thornton. That is, when there's a discussion of the fact that the beach was used as a highway by --

MR. REYNOLDS: That's true. But I think --

THE COURT: -- Native Americans prior to the time that the settlers even came here, there's a message here with respect to just how far back custom goes.

MR. REYNOLDS: But I think it's talking about a period of 60 plus years in which that activity occurred.

THE COURT: So your position, then, is that if the public had a right -- if the doctrine of custom would have caused the recognition in the right of the public to use the beach at the time the federal government owned the property, then the federal government either didn't give that right away when it issued its patent, or, if it did, then custom would permit the recognition of the reacquisition by the public of that right due to later activity --

MR. REYNOLDS: And I would submit the federal government is not in a position to give away the state's right. Because my understanding, once the federal government parts with title to land to the state, the governing of easements and

acquisitions and property rights is purely a matter of state property law. The Supreme Court recently reaffirmed that principle, I think, in a case we haven't cited in our brief, but Sierra Arizona Land and Cattle Company case.

THE COURT: There's no question about --

MR. REYNOLDS: Right.

THE COURT: There's no question about state law government -- state law governing title questions once the government has issued its patent, once the federal government has parted with title. But the question is what was transferred at the time of the parting of title.

But your position is that it doesn't matter --

MR. REYNOLDS: That's right, it doesn't matter.

THE COURT: -- because even if the federal government could have given it away, it was reacquired --

MR. REYNOLDS: That's right.

THE COURT: -- well before the time that Mr. McMurry's clients --

MR. REYNOLDS: And I think that's how I interpret Thornton.

THE COURT: Okay, one more question. Even if Mr. McMurry's clients had the right that they assert, they have known at least since Thornton v. Hay and the Beach Bill that there was a public declaration of a contrary right, have they not?

MR. REYNOLDS: They have known since the beach -- well, yes.

THE COURT: Doctrine of laches have anything to do with this?

MR. REYNOLDS: Well, we talked about that. We didn't assert that as a basis below, so we did not feel it was enough that we were in a position on appeal to assert --

THE COURT: Why not? You won?

THE COURT: Because laches is an affirmative defense --

MR. REYNOLDS: We think -- I mean, it's a long and complicated --

THE COURT: You're not there yet.

MR. REYNOLDS: We didn't assert it. And I'm not saying that we've waived the right to assert it if --

THE COURT: Well, you got the complaint dismissed. If it's an affirmative defense you're not that far along there.

MR. REYNOLDS: Yeah, that's right.

THE COURT: But it is a matter to be considered down the road defensively.

MR. REYNOLDS: I hope I've addressed the Lucas issue and why this isn't a taking. I mean, Lucas carves out an exception and says where you've applied existing principles of property law and you reach a particular result that's not a taking. It's not a taking if it's prescriptive easement; it's not a taking here.

THE COURT: Thank you, Mr. Reynolds.

Mr. McMurry.

MR. McMURRY: Thank you. I want to clarify a little confusion with respect to this ABDO zone and dunes and that sort of thing. Goal 18, by a 1985 amendment, explicitly applies not only to dunes but to beaches. The word "beaches" was inserted in 1985. So Goal 18 is an absolute bar to dry sand, to dunes, to anything without respect in effect to the zone line of the Beach Bill.

THE COURT: The exception process was never applied to it? There's no way around it?

MR. McMURRY: Oh, yeah, you can get an exemption to put up a temporary wooden walk, a temporary sand fence, a bonsai tree, but nothing permanent. And that's a

fair reading of it. It says, "Thou shalt not build," period.

Now, I want to come back to Justice Graber's point. What is this thing? In the McDonald v. Halvorson case Judge Lindy asked the state, "What is this thing, this right to walk? Is it an easement, is it a grant? What is it?" And no one could really put their finger on it.

If there was a well-founded -- well-founded -- doctrine of custom that gave people rights to land that was otherwise owned by private or public institution it was never enunciated in the state of Oregon. In fact, Thornton acknowledged that it had not been enunciated. Therefore it was a new case of first impression and only one case was

cited, a New Hampshire case, as having applied custom at that time in 1969.

THE COURT: Mr. McMurry, what can you possibly be claiming for this? No right is recognized until it's recognized. That's tautology. That doesn't help us very much.

MR. McMURRY: But if it's a case of new impression, if it's a case of new impression, then the question of retrospective and retroactive application has some --

THE COURT: Forgive me, but it wasn't until, I think, State v. Delgado -- no, there was a case earlier than that -- but it wasn't until the Delgado group of cases that we recognized that citizens of the state of Oregon have a right to

carry a gun, but they've had the right since 1859. It's not a case of retrospective application at all. It's a question of this is the right and it's always been the right.

MR. McMURRY: Well --

THE COURT: How is this different than that?

MR. McMURRY: Well, it seems to me that what Lucas is talking about when it says the state cannot by ipse dixit take what is private property and make it public.

THE COURT: What rights did your client have in this property, say, in 1975?

MR. McMURRY: In 197 --

THE COURT: Did they have a full bundle of sticks?

MR. McMURRY: Yes.

THE COURT: In other words, Thornton and the Beach Bill has no effect upon your clients' rights in this --

MR. McMURRY: They had the right to apply for a building permit subject to the Beach Bill's regulation and going through the control that the Beach Bill does apply; that's what they had. And that's what we say we still have. It's never been repealed, the 655 statute. In fact -

THE COURT: Is your answer to Justice Peterson's question that you rely on the ability to get a permit to develop under the 1969 law?

MR. McMURRY: Under the 1967 Beach Bill, that is correct. We rely on the Beach Bill. We're opposing Goal 18 which is the absolute prohibition of any development. The Beach Bill gives us the right, subject to reasonable regulation to develop our property. That's never been quite understood by the press.

THE COURT: Well, and I'm trying to be sure I understand your position of that, even though I'm just building on Justice Peterson's question really. So that means you agree that whatever regulation the Beach Bill imposed is a regulation imposed on you?

MR. McMURRY: Yes.

THE COURT: And their ownership?

MR. McMURRY: Yes.

THE COURT: So it's the additional regulation --

MR. McMURRY: It's the prohibition against any building that we're offended by.

THE COURT: And that didn't come about until '85?

MR. McMURRY: That's right.

THE COURT: Thank you.

THE COURT: Mr. McMurry, I understood you to state in your opening argument that you are not asking this Court to overrule Thornton v. Hay; is that correct?

MR. McMURRY: That is absolutely correct.

THE COURT: Did I understand you just a moment ago to argue that Thornton

v. Hay does not apply to your client because your client acquired title a decade before the Thornton decision was rendered?

MR. McMURRY: If it's to be as broadly read as the Attorney General has convinced the Court of Appeals, that it's an absolute bar and prohibition, then it doesn't apply.

THE COURT: To your client.

MR. McMURRY: To our client, because we believe that to be a retroactive --

THE COURT: Because you acquired title before the decision.

MR. McMURRY: Exactly. But I don't believe that's the rational understanding of Thornton or else you'd have to repeal

the component, the development component of the Beach Bill. I'm sorry, my time is up. Thank you.

THE COURT: Thank you, Mr. McMurry.  
(Proceedings concluded.)

DECLARATION OF TRANSCRIBER

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(4)  
No. 93-496

Supreme Court U.S.  
FILED

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

IRVING C. AND JEANNETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and  
STATE OF OREGON, by and through its  
Department of Parks and Recreation,

Respondents.

On Petition for a Writ of Certiorari to  
the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT STATE OF OREGON,  
DEPARTMENT OF PARKS AND RECREATION

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**BEST AVAILABLE COPY**

### **QUESTION PRESENTED**

Has plaintiffs' property been "taken" requiring payment of compensation when the state court, applying legal principles that have been part of the state's property law since statehood, concludes that plaintiffs' inability to develop their property is based on the public's acquisition of an easement that pre-dated plaintiffs' purchase of the property?

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DEPARTMENT OF PARKS AND RECREATION

## INTRODUCTION

Plaintiffs' petition for certiorari fails to raise an important question of federal law meriting this Court's discretionary review. The first and third questions they present were neither raised before nor addressed by the Oregon Supreme Court and necessarily are not reviewable for the first time by this Court. Plaintiffs' second question, which respondent has recast, does not merit review because it is largely based on state law considerations which the Oregon court correctly resolved against plaintiffs. Most important, however, the lower court resolved plaintiffs' total takings claims on grounds which plaintiffs do not challenge here. For this Court to review the only federal question actually presented, or even to review the questions not presented below, would be a waste of this Court's discretionary review

authority because the lower court's judgment affirming dismissal of plaintiffs' takings complaint could not be disturbed.

### STATEMENT OF THE CASE

The Oregon Supreme Court affirmed the trial court's dismissal of plaintiffs' complaint, which was based on motions to dismiss filed by the State and the City of Cannon Beach pursuant to Or. R. Civil P. 21(A)(8) (failure to state ultimate facts sufficient to constitute claims). *Stevens v. City of Cannon Beach*, 317 Or. 131, 135, 854 P.2d 449 (1993) (Pet. App. A4). The facts, then, for purposes of resolving the questions presented, are those set forth in plaintiffs' amended complaint, Resp. App. 1-9, rather than, as plaintiffs state, the "facts" set forth in their briefs before the Oregon appellate courts. Their briefs contained many "facts" that were not set forth in their amended complaint, that were not properly before the State courts for review, and that were not considered on appeal.

#### I. Statement of Facts

Plaintiffs own oceanfront property in the City of Cannon Beach. Amended Complaint ¶ 1 at App-1. The property is zoned for residential/motel use. However, most of it also is subject to an "overlay zone," adopted by the City of Cannon Beach which prohibits the construction of residential, commercial or industrial buildings. The overlay zone was enacted to implement statewide land use planning Goal 18, adopted by the State Land Conservation and Development Commission ("LCDC"), regulating land use on Oregon's beaches and dunes. LCDC Goal 18 also precludes the construction of residential developments and commercial or industrial buildings on beaches, active foredunes and other unstable areas of the Oregon coast. *Id.* ¶¶ 5, 10 at App-2, App-3.

A substantial portion of plaintiffs' property lies on the "dry sand area" of the beach and is seaward of the "zone line" established by the State's Beach Bill. *Id.* ¶ 29 at App-6; Exhibit 1 to Complaint at 3; Exhibit 2 to Complaint at 1. That law requires a permit prior to any development of such land. Or. Rev. Stat. § 390.650.

Plaintiffs want to develop their oceanfront property. They wish to construct a seawall on the dry sand area, backfill that property behind the new wall and construct a hotel on the site. Amended Complaint ¶ 14 at App-3; Exhibit 2 to Complaint at 7. Because of the location of the property, plaintiffs were required to obtain several permits to construct the seawall: one from the City of Cannon Beach because of the overlay zone; one from the Oregon State Parks and Recreation Department ("department") pursuant to the Beach Bill; and one from the Oregon Division of State Lands, for permission to fill and remove coastal lands. Plaintiffs submitted permit applications to all three agencies. Amended Complaint ¶¶ 14, 30 at App-3, App-6; Exhibit 2 to Complaint at 8.

The City of Cannon Beach denied plaintiffs' application. *Id.* ¶ 14 at App-3. After reviewing plaintiffs' application materials, the City concluded that plaintiffs had failed to satisfy a number of policies and conditions set forth in the City's comprehensive plan and zoning ordinance. For example, in its findings of facts and conclusions, the City found that the application was inconsistent with the City's flood hazard policy; that it was inconsistent with the City's policies and ordinances prohibiting commercial development on the beach; that plaintiffs provided no evidence of the necessity of constructing such a seawall to control erosion, as is required; that plaintiffs failed to provide evidence that their proposed project would preserve required public access to the

beach, or that visual impacts would be minimized, or that riparian vegetation would be preserved. *See generally* Exhibit 1 to Complaint.

The Parks and Recreation Department denied plaintiffs' application as well. Amended Complaint ¶ 31 at App-6. The department's denial, like that of the City, was based on plaintiffs' failure to comply with a number of permit requirements set out ~~in the applicable law~~ and regulations. In particular, the department found that the proposed seawall posed a safety threat to the public and the environment by increasing the threat of erosion and precluding safe escape from the beach in the event of high or storm tides. The department also noted that the proposed project would result in the loss of approximately 12,500 square feet of dry sand beach, to which the public currently has lawful access. The department concluded that plaintiffs failed to address how this right of public recreational use would be mitigated. *See generally* Exhibit 2 to Complaint.

The department further concluded that the proposed project would not comply with other applicable state and local laws. In particular, the department found that plaintiffs had failed to obtain the necessary approval of the local zoning authority (the City of Cannon Beach) and the approval of the Division of State Lands. The department also noted that plaintiffs' ultimate objective — construction of a hotel on the beach — was inconsistent with LCDC Goal 18. *Id.* at 6-8.

Finally, the Director of the Division of State Lands denied plaintiffs' permit application to that agency. *Id.*

Plaintiffs did not appeal the City's decision. Nor did they pursue the next step in the administrative process for challenging the decision of the Division of State Lands — namely, a request for a contested case hearing under the State's Administrative

Procedure Act, Or. Rev. Stat. §§ 183.413 – 183.497. Instead, plaintiffs filed this action for damages in Clatsop County Circuit Court.

## II. Procedural History

Respondent sets out the procedural history in some detail because it demonstrates that plaintiffs did not raise in their complaint or on appeal two of the three federal questions they assert that this case presents.

Plaintiffs' complaint included five claims: two against the City of Cannon Beach and three against the State. In their first claim, they alleged that the City's decision, as applied to their property, caused the property to have no economically beneficial use and effected an unconstitutional taking. Amended Complaint ¶¶ 1-21 at App-1 – App-5. In their second claim, they alleged that the City's overlay zone resulted in an unconstitutional taking because, on its face, it deprived them of all economically beneficial use of their land. *Id.* ¶¶ 22-27 at App-5 – App-6. In their third claim, plaintiffs alleged that the department's decision to deny their application effected an "as applied" taking. *Id.* ¶¶ 38-36. In their fourth claim, they alleged that LCDC Goal 18, on its face, was a taking of their property. *Id.* ¶¶ 37-41 at App-8. Finally, in their fifth claim, plaintiffs asked for judicial review of the Parks and Recreation Department's denial of their application to build a seawall and prayed for damages and attorney fees on that claim. *Id.* ¶¶ 42-43 at App-8 – App-9.

The City and the State moved to dismiss the four takings claims, based on the Oregon Supreme Court's decision in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969). In a nutshell, defendants argued that, in light of *Thornton*, denying a permit to build a seawall or a hotel on the beach cannot be a taking of property, even if doing so does precludes the owner

from using the property for any economically beneficial use. In *Thornton*, the Oregon Supreme Court held that dry sand property owners do not have a proprietary interest that enables them to erect structures that would exclude the public from the dry sand areas of the beach. The Oregon court applied the common law doctrine of custom and held that the public, as a result of long, continuous use of the dry sand portion of Oregon's beaches, had acquired a recreational easement on the dry sand, a right with which private property owners could not interfere.

Both defendants also moved to dismiss the four takings claims on other grounds. They argued that the facial takings claims could not be maintained because on the face of the challenged regulations, both the overlay zone and LCDC Goal 18 do not preclude all use of private property. They also argued that the "as applied" takings claims could not be brought because plaintiffs had failed to satisfy the non-constitutional bases for the permit denials and because plaintiffs failed to exhaust available administrative remedies. In addition, the State moved to strike the request for damages and attorney fees from the judicial review claims. *Id.*

The trial court granted defendants' motions to dismiss, based on the *Thornton* decision. It also granted the State's motion to strike. The court did not address the other motions, as its decision operated to dismiss all of the takings claims. When plaintiffs voluntarily dismissed their claim for judicial review of the department's permit denial, the court entered judgment in favor of defendants on the claims that remained.

Plaintiffs appealed the trial court's decision to the Oregon Court of Appeals. In their opening brief, plaintiffs set forth two assignments of error:<sup>1</sup>

Assignment of Error no. 1: The lower court erred in holding that *State ex rel Thornton v. Hay* eradicated private owners' rights to any development of their "dry-sand" portion of the beach.

Assignment of Error no. 2: The lower court erred in not ruling on all of defendants' motions to dismiss, and in the interest of judicial economy, this court should rule on those motions.

Pet. App. G74.<sup>2</sup>

Plaintiffs summarized their argument addressed to the *Thornton* decision with the following four points:

(A) *Thornton* determined that the State could enjoin the construction of a fence built on the "dry sand," not built in accordance with ORS 390.650. It did not declare that no structure could ever be built on the "dry-sand" area of Cannon Beach.

(B) To construe *Thornton* as preventing all economic development by the private owner of the "dry-sand" portion of Cannon Beach, results in an implied repeal of the Beach Bill (ORS 390.605, *et seq.*; a result no [*sic*]

<sup>1</sup> Assignments of error are required under Oregon state appellate practice. Or. R. App. Proc. 5.45(1). To consider a matter on appeal, the matter must not only have been preserved in the lower court but also assigned as error on appeal. *Id.* 5.45(2).

<sup>2</sup>In their appendix at G60-132, plaintiffs set forth the argument from their Court of Appeals opening brief relating only to their first assignment of error. The argument in support of their second assignment of error is set out at pages 39-47 of their opening brief. Plaintiffs' second assignment of error was directed to the State's and City's alternative motions to dismiss, which were independent of the *Thornton* decision.

understood, let alone argued for, by anyone until this case.

(C) *Thornton* is not *res judicata* as to plaintiffs, and they have the right to show that the doctrine of ancient custom is not applicable to their land.

(D) If *Thornton* is construed to prevent all economic development of private property consisting of "dry sand," it constitutes an unconstitutional taking of plaintiffs' property.

Pet. App. G78-79. Thus, parts (A) and (B) of plaintiffs' argument were that the trial court misinterpreted the *Thornton* decision. In part (C), plaintiffs argued that because they were not parties before the court in *Thornton*, their property rights could not be determined by that case, so they proceeded to discuss why the doctrine of custom found to apply in that case should not apply to their property.<sup>3</sup> In part (D), plaintiffs argued that after the decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Thornton* could not be sustained because *Nollan* recognized that the right to exclude persons from property is a

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<sup>3</sup> Plaintiffs argued:

The *Thornton* court paraphrased the seven elements of ancient custom, as set forth in Blackstone's, *Commentaries* (1765-1769), as follows: (1) Antiquity; (2) An exercise of use without interruption; (3) Peaceable use; (4) Reasonable use; (5) Certainty as to the land in question; (6) Use as a matter of right; and (7) Consistency with other custom or law.

Of these elements, the first: *antiquity*; the second: *an exercise of use without interruption*; the fourth: *reasonable use*; the sixth: *use as a matter of right*; and the seventh: *consistency with other custom or law*, are each of doubtful applicability in this case, and were of doubtful application to the property before the *Thornton* court. They shall be analyzed in order.

property interest that the State may not take from the owner without paying compensation. Pet. App. G118-32.

The State and City answered each of plaintiffs' arguments. The State argued that the trial court properly interpreted *Thornton* as holding that private owners of dry sand on the beach have no property interest that entitles them to exclude the public from exercising its recreational easement over the dry sand. The State further argued that there could be no question but that, based on the *Thornton* decision itself as well as a recent Oregon Supreme Court decision,<sup>4</sup> *Thornton* applied to plaintiffs' property: plaintiffs' property was not only also located in Cannon Beach but was directly adjacent to the very property considered in *Thornton*. Finally, the State argued that *Thornton* did not constitute a taking of plaintiffs' property, because for a taking to occur there has to be some property interest being taken. Given *Thornton*'s holding that the public possessed a recreational easement over the dry sand, the denial of any development that would interfere with the public's easement could take no property interest, and no compensation therefore was due.

The State set forth a separate grounds for upholding the trial court's judgment dismissing plaintiffs' amended complaint. The State argued that even if the trial court were wrong in relying on *Thornton*, independent grounds supported the judgment. The State asserted that LCDC Goal 18 is constitutional on its face and does not, as applied, "take" plaintiffs' property because the goal in fact permits other economically beneficial uses of plaintiffs' property. Plaintiffs' takings challenge directed to the department's denial of their permit was not ripe because plaintiffs had failed to exhaust available administrative review remedies. Also,

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<sup>4</sup> *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989).

that claim was premature because the denial was based in part on plaintiffs' failure to comply with several permit requirements that were lawful and that plaintiffs did not challenge. Plaintiffs filed a reply brief in which they attempted to refute the alternative and independent grounds the State had asserted for upholding the trial court's dismissal of their amended complaint.

The court of appeals concluded that *Thornton* was controlling and, thus, affirmed the trial court's dismissal of plaintiffs' takings claims. *Stevens v. City of Cannon Beach*, 114 Or. App. 457, 459, 835 P.2d 940 (1992) (Pet. App. B19-21).<sup>5</sup> The court stated that "under the Supreme Court's decision in *Hay*, plaintiffs have never had the property interests that they claim were taken by defendants' decisions and regulations."<sup>6</sup> Pet. Cert. App. A21. The court then concluded that the decision in *Thornton* did not effect a taking under *Lucas v. South Carolina Coastal Council*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2886 (1992). The court reasoned that *Thornton* "is an expression of state law that the purportedly taken property interest was not part of plaintiffs' estate to begin with." Pet. Cert. App. B21. Recognizing that *Lucas* disavowed any notion that a taking occurs where "proscribed use interests were not part of [the landowner's] title to begin with," 112 S.Ct. 2899, the court of appeals held that "there was no taking within the meaning of the Oregon or United States Constitutions." Pet. Cert. App. B21.

On review in the Oregon Supreme Court, plaintiffs did not urge that *Thornton* was wrongly decided and should be overruled. To the contrary, they expressly conceded that they were not

<sup>5</sup> Plaintiffs' appendix inadvertently omits page 459 from the Court of Appeals decision.

<sup>6</sup> The Court of Appeals' opinion refers to the *Thornton* decision as *Hay*.

making that argument. Pet. Cert. App. I200. They limited themselves to two arguments. First, they argued that the lower courts had unjustifiably interpreted *Thornton* as prohibiting *all* development on the dry sand area. Such a conclusion conflicted with *Lucas*, they argued, because takings of the type described in *Nollan* could be accomplished by court decree, and the doctrine announced in *Thornton*, as interpreted by the lower courts, did not exist when they purchased their property. Plaintiffs asked for a much more limited interpretation: that *Thornton* merely held that the State has the power reasonably to limit construction on the dry sand portion pursuant to the Oregon Beach Bill (Or. Rev. Stat. §§ 390.605 - 390.690, Pet. App. E34), but not to deprive an owner of all economic use of the land. Pet. Cert. App. H147-54.

Second, plaintiffs contended that *Thornton* was not decided until 1969, twelve years after they acquired their ocean front property, and that to apply *Thornton*'s "new principal [sic] of law" to their property, decided "*ipse dixit*" by the court, would constitute an impermissible retroactive application of a legal pronouncement. Pet. Cert. App. H154-168.<sup>7</sup>

The Oregon Supreme Court affirmed the court of appeals. Pet. Cert. App. A1. First, the court observed that plaintiffs had not asked it to overrule *Thornton* or to have the Beach Bill declared unconstitutional. The court's opinion then evolved into two parts. The first discussed *Thornton* and explained why the decision, as correctly interpreted by the court of appeals, did not effect a taking of plaintiffs' property under *Lucas*. The second

<sup>7</sup> Plaintiffs pressed other arguments as well, Pet. App. H169-176, but these arguments, to the extent they differed from ones previously raised, dealt only with purely state law issues.

addressed plaintiffs' claim that LCDC Goal 18, as applied through the City's ordinance and the department's regulations, deprives plaintiffs of all economically beneficial use of their property.

The court concluded the first portion of its opinion by stating:

Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom as applied to Oregon's ocean shores in *Thornton* is not "newly legislated or decreed"; to the contrary, to use the words of the *Lucas* court, it "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 821. As noted in *Hay v. Bruno, supra*, 344 F Supp at 289, "there was no sudden change in either the law or the policy of the State of Oregon. For at least 80 years, the State as a matter of right claimed an interest in the disputed land." Plaintiffs' argument that a "retroactive" application of the *Thornton* rule to their property is unconstitutional, is not persuasive. *Thornton* did not create a new rule of law and apply it retroactively to the land at issue in that case, *Hay v. Bruno, supra*; nor did *Thornton* create a new rule of law applied to plaintiffs' land here. *Thornton* merely enunciated one of Oregon's "background principles of \* \* \* the law of property." *Lucas, supra*, 120 L Ed 2d at 832. We therefore agree with the Court of Appeals, which concluded that the trial court's reading and application of *Thornton* were correct. 114 Or App at 459.

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or at 598. See also *State Highway v. Fultz, supra*, 261 Or

at 289 (public use has existed since 1889). We, therefore, hold that the doctrine of custom as applied to public use of Oregon's dry sand areas is one of "the restrictions that background principles of the State's law of property \* \* \* already place upon land ownership." *Lucas, supra*, 120 L. Ed 2d at 821. We hold that plaintiffs have never had the property interests that they claim were taken by defendants' decision and regulations.

Pet. Cert. App. A11-12.

The court's conclusion that, under *Thornton*, plaintiffs had no property interest that had been "taken" by the denial of their seawall permit disposed of their takings claim. Nevertheless the court also concluded that plaintiffs had failed to demonstrate that LCDC Goal 18's application to their property deprived them of all economically beneficial use of their property. The court rejected plaintiffs' facial attack on the goal, stating:

It is clear from LCDC Goal 18, however, as well as from the regulations and ordinances at issue here, that what is prohibited is "residential developments and commercial and industrial buildings." Not all economically viable uses of plaintiffs' property falls [sic] within that prohibition. . . .

. . . Because LCDC Goal 18 makes provisions for certain economically viable uses of private beaches and dunes, we conclude that city's ordinances and department's administrative rules implementing that goal do not constitute a facial taking of private property.

Pet. Cert. App. A16.

The court similarly rejected plaintiffs' "as applied" claim. First, the court refused to analyze plaintiffs' claim as though the City and department had denied them a permit to build a motel or hotel on the property; plaintiffs had applied only for a seawall construction permit. Second, it was clear that at least in some circumstances, LCDC Goal 18 permitted seawalls to be con-

structed, and plaintiffs had not shown that they would be unable to build one under any circumstance. Had plaintiffs been able to satisfy several of the City's criteria, compliance with which was not impossible based on LCDC Goal 18, it was "far from clear" that doing so "would not have resulted in city's approval of plaintiffs' conditional use permit to build a seawall." Pet. Cert. App. A18.

As to the department's denial of the seawall permit, the court noted that the denial based on LCDC Goal 18 had been premised on an erroneous finding of fact that plaintiffs, had they pursued their available administrative remedies, could have cured:

The state's denial of the permits to build the seawall was premised on its findings that plaintiffs failed to meet the criteria set forth in OAR 736-20-005 through OAR 736-20-025. Only OAR 736-20-010(6) pertains to the requirements of LCDC Goal 18. In its finding pertaining to this subsection, however, the state erroneously found that no development existed on these lots before January 1, 1977. Complaint, Exhibit 2, at 9. This finding conflicts with city's finding in this regard, as well as the facts as stated in plaintiffs' complaint, which we take as true for purposes of this review. The lots in question were "developed" under the definition provided in LCDC Goal 18 Implementation Requirement 5, because they were "vacant subdivision lots which are physically improved through construction of streets and provision of utilities[.]" We conclude that the state's finding was erroneous, but we are unable to conclude that the error was the reason for denial of the permit in the present case or that compliance with "technical objections" would have been futile.

Had plaintiffs pursued the remedy available for review of department's decision, that error could have been addressed. ORS 390.658. Plaintiffs, however, chose

to dismiss their claim under that statute. The fact that review of this issue would have been available under ORS 390.658 certainly undermines plaintiffs' claim that pursuit of other remedies would have been futile.

Pet. Cert. App. A18, n.16.

The Oregon Supreme Court concluded its analysis of plaintiffs' takings claims as follows:

Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because "the proscribed use interests" asserted by plaintiffs were not part of plaintiffs' title to begin with, they withstand plaintiffs' facial challenge to their validity under the takings clause of the Fifth Amendment. *Lucas, supra*, 120 L Ed2d at 820. Moreover, because it is clear that, under the challenged ordinances and regulations, a seawall could be built on plaintiffs' land if the other criteria, not challenged in this case, were met, those sources of law withstand an "as applied" challenge in the present case. We hold that there was no taking of plaintiffs' property within the meaning of the Fifth Amendment. *Lucas, supra*.

Pet. Cert. App. A18a.

### ARGUMENT

Plaintiffs' challenge is directed solely to the State courts' interpretation of *State ex rel. Thornton v. Hay, supra*, and its application to this case. Most of the arguments that they direct to that issue were not raised before nor discussed by the Oregon Supreme Court and should not be considered by this Court.

More important, however, plaintiffs' total takings claim was rejected by the Oregon Supreme Court on grounds independent of the *Thornton* decision. Plaintiffs do not challenge those independent grounds in their petition for writ of certiorari. The Oregon court concluded that plaintiffs had failed to allege facts sufficient to demonstrate that LCDC Goal 18, which bans much

development on the dry sand portion of Oregon's beaches, denies plaintiffs all economically viable use of their property. At most, then, the holding of the Oregon Supreme Court is that while *Thornton* recognizes a public recreational easement over plaintiffs' property, plaintiffs continue under the Beach Bill and LCDC Goal 18 to have some economically viable use of their property. If the Oregon Supreme Court was wrong in its application of *Thornton* to this case, at most plaintiffs have been deprived of one of their property interests — the right to exclusive possession — but they have not been deprived of all economically viable use of their property.

Plaintiffs' complaint, however, did not allege a partial taking of their property, as the property owners had alleged in *Nollan*. Plaintiffs' claim here was that LCDC Goal 18, as applied by the City and the department, deprived them of all economically beneficial use of their property. The question whether *Thornton* improperly takes away from plaintiffs only one of their property interests is irrelevant under their total takings claim. Necessarily, then, even if this Court were to grant certiorari in this case and ultimately agree with plaintiffs' analysis of *Thornton*, that would not disturb the lower courts' dismissal of plaintiffs' total takings claim. Viewed in this context, the question of *Thornton*'s correctness is purely an abstract question. The petition for certiorari should be denied.

**I. The Oregon Supreme Court's affirmance of the dismissal of plaintiffs' complaint rests on independent grounds which plaintiffs do not challenge here.**

Plaintiffs' amended complaint alleged that the City's and the department's denials of their permit to build a seawall on the dry sand portion of their property deprived them of all economically viable use of their property. The gravamen of their claim was

directed to Oregon's Statewide Planning Goal 18, adopted in 1985, which they alleged "require[s] local governments and state and federal agencies to prohibit residential developments and commercial and industrial buildings on beaches." LCDC Goal 18's prohibition on commercial, industrial and residential development, they asserted, deprived them of all economically beneficial use of their property, both on its face and as applied to their property.

The department and the city defended this attack on two fronts. First, they argued that LCDC Goal 18, in denying commercial, residential and industrial development that would have the effect of interfering with the public's recreational use of the dry sand, did not deprive dry sand property owners of any property interest, given the decision in *State ex rel. Thornton v. Hay, supra*. In that decision, the Oregon Supreme Court applied the state law doctrine of custom and concluded that the public, through long, continuous use of the dry sand portion of Oregon's beaches, had acquired a recreational easement with which the dry sand owner could not interfere by erecting fences or other obstacles. Necessarily, a seawall, or any other commercial, residential or industrial development on the dry sand, would interfere with the public's recreational easement on the dry sand. Accordingly, to the extent LCDC Goal 18 prohibited such developments, it deprived dry sand owners such as plaintiffs of no property interest, and could not, therefore, constitute a taking of their property.

Second, however, the department and the city argued that independent of *Thornton*, LCDC Goal 18 did not deprive dry sand owners of all economically beneficial use of their property, either on its face or as applied. Therefore, even if *Thornton* were wrongly decided or did not apply to plaintiffs' property, LCDC

Goal 18 allowed plaintiffs economically beneficial use of their property and no total takings claim had been adequately alleged.

The Oregon Supreme Court agreed with the department and the City on both points. It concluded that LCDC Goal 18 did not deprive plaintiffs of a property interest, because, under *Thornton*, and as a matter of state property law, plaintiffs had no development rights in the dry sand portion of their property that could interfere with the public's custom-based recreational easement over the dry sand. The court further held that LCDC Goal 18 did not deprive plaintiffs of all economically beneficial use of their property in any event.

To grant certiorari, this Court requires the presence of an important question of federal law. Sup. Ct. Rule 10.1. Here, the lower court's decision rests on two independent grounds, both potentially involving federal questions. Petitioners claim, however, is directed to only one of the grounds for the decision.

Plaintiffs here do not challenge the other ground. While a federal question could be raised as to whether the Oregon court's conclusion that LCDC Goal 18, independent of its *Thornton* moorings, either on its face or as applied, deprives plaintiffs of all economically viable use of their property, plaintiffs do not present that question in their petition. The only question they raise relates to the correctness of the Oregon court's application of the *Thornton*-articulated doctrine of custom to their property.

This Court's resolution of the limited federal question presented therefore will not affect the validity of the result the lower court reached and, hence, will afford the plaintiffs no relief. Regardless of how interesting the federal question actually presented may be, it is merely an abstract question because its resolution has no practical effect on the decision below. For that

reason, plaintiffs' petition fails to raise an important federal question, and the petition should be denied.<sup>8</sup>

**II. The validity or applicability of *Thornton* to plaintiffs' property, even if plaintiffs' had made a partial takings claim, does not present a substantial federal question meriting this Court's review.**

Plaintiffs assert that this case "for the first time, presented to the Oregon high court three direct challenges to the present day validity of *Thornton*." Pet. Cert. 12. Two of those challenges — that *Thornton* constitutes a collateral attack on the federal patent conveying their property to their predecessors in interest (first "challenge"), and applying *Thornton* to their property deprives them of due process and equal protection (third "challenge") — never were presented to or addressed by the Oregon Supreme Court. Only plaintiffs' second "challenge" — i.e., that *Thornton*'s announced property law principle that the public could acquire a recreational easement by custom was not, pre-*Thornton*, part of the state's background principles of property law within the meaning of *Lucas* — was raised before and decided by the Oregon Supreme Court.

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<sup>8</sup> If plaintiffs' complaint had included a claim such as that presented in *Nollan* i.e., that a valuable property interest, the right to exclusive possession, had been taken from them, the Oregon court's resolution of *Thornton* would have some practical consequence. If a partial takings claim had been made, and the department and the City had defended that claim on the basis that plaintiffs had no property-based right to exclude the public based on *Thornton*, then plaintiffs would have a basis for arguing that the Oregon court's decision addressing *Thornton* had some practical consequence, even though the Oregon court had on other grounds affirmed the dismissal of plaintiffs' total takings claim. But plaintiffs' complaint included only total takings claims. Given that the Oregon court affirmed the dismissal of these claims on grounds independent of *Thornton*, and given that plaintiffs do not challenge those independent grounds, *Thornton*'s importance as a federal question evaporates.

Plaintiffs' second question can be broken into two parts, the first of which is essentially a state law question and the second of which is a federal law question. The state law part of the question consists of two subparts: (1) whether Oregon's property law, prior to *Thornton*, contained a principle that the public could acquire a recreational easement under the common law doctrine of custom; if so, (2) whether *Thornton* correctly concluded that the requirements for such an easement had been satisfied. The Oregon court resolved these fundamentally state-law questions in the affirmative, and no basis exists for this Court to disturb the lower court's holding.

The second part of plaintiffs' question presents the federal law question of whether the Oregon court's holdings satisfy *Lucas* and, therefore result in no taking requiring compensation. This part also consists of two subparts: (1) whether the doctrine of custom satisfies *Lucas*' holding that limitations on use of property grounded in state property law principles do not result in takings; and (2) whether the public recreational easement recognized in *Thornton* satisfies *Lucas*' statement that where a physical occupation of land is based on a "permanent easement that was a preexisting limitation upon the landowner's title," no taking requiring compensation results. 112 S.Ct. at 2900.

Contrary to plaintiffs' arguments, the Oregon Supreme Court properly determined that the doctrine of custom was a background legal principle in Oregon within the meaning of *Lucas*, and that the public recreational easement was a preexisting limitation on the plaintiffs' property that defeated their takings claims. The lower court's resolution of those questions is unremarkable, in light of *Lucas*' clear guidance. Moreover, inasmuch as few States appear to adhere to the doctrine of custom, and plaintiffs are able to cite no decisions of other courts

that are in conflict with the analysis the lower court followed or the result that it reached, this Court's review would largely be error correcting in nature. No important federal question is presented under these circumstances that warrants the exercise of the Court's discretionary jurisdiction.

**A. Plaintiffs' first and third challenges were not raised before nor decided by the Oregon Supreme Court.**

It is virtually axiomatic that this Court will not consider a question to meet the "substantial federal question" requirement necessary to invoke this Court's jurisdiction when the question was not properly raised in the state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This doctrinal limitation on the exercise of jurisdiction applies to the first and third questions plaintiffs ask this Court to review.

**1. Whether, as matter of federal law, *Thornton* is a collateral attack on the issuance of federal patents was not presented below. In any event, plaintiffs' argument is based on a misreading of *Thornton*.**

Plaintiffs' first argument in support of granting certiorari is that the *Thornton* decision "is, necessarily, a collateral attack upon the original 1893 patent granted petitioners' predecessor in title." Pet. Cert. 14. Plaintiffs argue that *Thornton* declared the existence of a public recreational servitude on their property that predated the issuance of federal patents to their predecessor in title in 1893. Under *Summa Corporation Ltd. v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984), which plaintiffs assert the court below "ignored," (Pet. Cert. 17), the issuance of a federal patent bars all inchoate, unrecorded claims not presented and resolved in the patent proceedings. The public recreational servitude is, in petitioners' view, such an inchoate, unrecorded claim. Thus, they argue, the *Thornton* decision, as

applied in this case, "stand[s] in stark contrast to the controlling federal law of title and property rights to littoral land enunciated by this Court in a line of cases stretching . . . to *Summa Corporation v. California*, *supra*, decided in 1984." Pet. Cert. 20.

Conspicuously absent from plaintiffs' petition for review filed in the Oregon Supreme Court was any reference to any of the "line of cases," including *Summa Corporation*, to which they now refer in their petition for certiorari, or any argument that remotely resembles the patent argument they advance in their certiorari petition. Aside from a brief discussion at oral argument in the Oregon Supreme Court alluding to the effect of patents issued in 1893, (Pet. Cert. App. 1195-97) plaintiffs' only reference to the subject of patents was made in their court of appeals brief.

In the court of appeals, however, plaintiffs did not argue that as a matter of federal law *Thornton* should be overruled or limited based on the title their predecessor obtained by patent in 1893. Rather, plaintiffs' patent discussion was made in an attempt to convince the court of appeals that the "antiquity" element of the doctrine of custom had not been satisfied as to their property. Pet. Cert. App. G95-107. As so raised, plaintiffs' argument was a state law issue — did their property properly fit within the state law doctrine of custom? They specifically did not argue that if the court found that their property did fit the doctrine, that the court nevertheless should not apply it because to do so would infringe on the federal patent rights their predecessor in interest had acquired.

Plaintiffs' argument to this Court, in any event, is based on a misreading of what *Thornton* and the courts below in the present case actually held. Neither *Thornton* nor the courts below

concluded that the public's recreational easement had come into being prior to issuance of federal patents in 1893. Rather, what was in existence at that time, and had been since before Oregon's statehood was achieved in 1859, was the common law *principle* that public easement rights could be acquired under the doctrine of custom. While the *Thornton* decision recognized that the public had enjoyed the dry sand area of Oregon's beaches "since the beginning of the state's political history," 254 Or. at 588, the court did not conclude that a public easement had been acquired prior to 1893. In the present case, the Oregon Supreme Court also did not pinpoint the date the public easement came into being, but only noted that

[w]hen plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed." *Thornton, supra*, 254 Or. at 598. *See also State Highway v. Fultz, supra*, 261 Or. at 289 [491 P.2d 1171 (1971)] (public use has existed since 1889). . . .

Pet. Cert. App. A12.

To the extent, then, that plaintiffs' patent infringement argument rests on the assumption that *Thornton* had held that a public recreational easement on the dry sand of Oregon's beaches pre-dated 1893, it is factually erroneous.

**B. Whether the decision in *Thornton* or its application in the present case deprives plaintiffs of due process or equal protection was neither raised before nor addressed by the Oregon Supreme Court.**

Plaintiffs' third argument in support of certiorari is that as applied to them, the doctrine of custom deprives them of due

process of law and equal protection of the laws. Pet. Cert. 38-48. Plaintiffs' due process argument is based on the contention that they are entitled to be heard before their right to exclude the public from their property can be extinguished. They claim that the Oregon Supreme Court applied the *Thornton* presumption of an easement to overcome their historical and legal analysis showing the impropriety of the doctrine of custom, as applied to their property. Plaintiffs' equal protection claim is based on alleged unequal enforcement of the custom doctrine along Oregon's beaches, as well as Oregon's alleged unequal application of the doctrine to other riparian land.

### 1. Due Process

Plaintiffs did not argue to the Oregon Supreme Court that to apply *Thornton* to them would deprive them of procedural due process, nor did they include such a claim in their complaint. Rather, plaintiffs only argued that to apply the *Thornton* legal principle to them, inasmuch as it was first announced in that case, constituted an improper retroactive application of state law. Pet. Cert. App. H154-64.

The Oregon Supreme Court properly disposed of plaintiffs' retroactivity argument, primarily based on its conclusion that the doctrine of custom had always been part of the property law of the State of Oregon. Pet. Cert. App. A12.<sup>9</sup> Inasmuch as Oregon

<sup>9</sup> While *Thornton* may have been the first decision in Oregon expressly recognizing that property rights legally could be acquired by custom, earlier decisions, at least implied or alluded to the doctrine as a source of such rights. See, e.g., *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865 (1908) (rejecting a custom-based claim to an exclusive fishery in the Rogue River, but recognizing the existence of the doctrine of custom).

adopted the common law,<sup>10</sup> which allowed easements to be obtained by custom, grant or prescription, and inasmuch as no judicial decisions or legislative acts prior to *Thornton* rejected custom as a basis for acquiring an easement, it can be fairly said that at the time *Thornton* was decided, the principle that an easement could be acquired by custom was as much a valid part of Oregon's property law as was the principle that an easement could be acquired by prescription.<sup>11</sup> Any person who acquired the fee title to real property did so with the knowledge — constructive or otherwise — that an easement over that person's property could be acquired by application of one or the other of these two principles.<sup>12</sup> Thus, *Thornton* did not announce a new principle of property law; it simply applied an existing principle to the factual situation in that case.

Plaintiffs do not press their retroactivity argument in this Court, just as they did not press their due process argument before the Oregon Supreme Court. This Court should not entertain plaintiffs' retroactivity argument, which they have abandoned, nor address their due process argument which they now raise for the first time in their petition for certiorari.

<sup>10</sup> See Or. Const., Art. XVII, § 7; *Hale v. Port of Portland*, 308 Or. 508, 513-14, 783 P.2d 506 (1989).

<sup>11</sup> In *Hume v. Rogue River Packing*, *supra*, 51 Or. at 253, the court listed the common law elements of prescriptive easement and then rejected the claim to an exclusive fishery based on this doctrine because Hume's prescriptive right claim did not possess the requisite adversity.

<sup>12</sup> This applies to federal patentees as well, inasmuch as they take title from the federal government subject to the State's property law. See, e.g., *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977).

## 2. Equal Protection.

Similarly, plaintiffs presented no equal protection argument below and did not include such a claim in their complaint. Indeed, consideration of plaintiffs' equal protection argument is particularly inappropriate because it is based entirely on factual assertions that are not included in their amended complaint and are, thus, outside the record properly before this Court.<sup>13</sup>

### B. Whether the Oregon court properly applied *Thornton* in light of *Lucas* raises no substantial federal question.

Plaintiffs' second challenge is that *Thornton*, "by ipse dixit [transforms] petitioners' fundamental property right of exclusive possession of the dry sand into a permanent physical occupation by the public for their unlimited recreational pleasure." Pet. Cert. 21. Plaintiffs' argument under this challenge is multi-faceted. They argue that the Oregon court's application of the doctrine to their property is "problematic" given "the historical facts affecting the land in question and Oregon's legal history." Pet. Cert. 23-30. They then argue that *Thornton* extinguishes a fundamental property right "without any prior precedent in the state backgrounding a principle of 'easement by custom,'" Pet. Cert. 33. They challenge the Oregon court's determination that the doctrine of custom was part of Oregon's property law at the time plaintiffs purchased their property. Pet. Cert. 34-36. Finally, they contend that the length of use of the dry sand as determined by the Oregon courts is not what matters under *Lucas*. Rather, what matters is whether the principle that would

permit the public to acquire an easement over the dry sand existed at the time they purchased their property. Plaintiffs then declare that "[n]o one can honestly argue that such a rule backgrounded principals [sic] of Oregon's common law of real property prior to 1969 and *Thornton*." Pet. Cert. 37.

As discussed briefly above, plaintiffs' second question can be divided into two parts — the first of which is a state-law question and the second of which is a federal question. The state-law part of the question consists of two subparts. The first is: did the doctrine of custom form a part of the State's property law pre-*Thornton*, or did it come into existence only when *Thornton* was decided? The second subpart is: if the doctrine pre-dated *Thornton*, did the Oregon Supreme Court properly determine that the elements of the doctrine had been satisfied?

Whether the doctrine of custom was part of the State's property law pre-*Thornton*, and whether the Oregon court properly concluded that the doctrine's elements had been satisfied is a state law, not a federal law question. It is, therefore, beyond the authority of this Court to review. *Williams v. Kaiser*, 323 U.S. 471, 477 (1945). Thus, in considering plaintiffs' takings claims, this Court must take it as given that before the decision in *Thornton* and before plaintiffs had purchased their property in 1957, the public had acquired a recreational easement over the dry sand portion of Oregon's beaches.

The federal question part of plaintiffs' challenge, then, is whether, under *Lucas*, the public recreational easement constitutes (1) a limitation on the use of property that is grounded in state property law principles; or (2) a "permanent easement that was a preexisting limitation upon the landowner's title." *Lucas*, 112 S.Ct. at 2900. In either case, a restriction on or elimination of economically beneficial uses that flow from these sources does

<sup>13</sup> For example, plaintiffs refer the Court to the so-called "legislative facts" set forth at pages 22-27 of their petition. Pet. Cert. 44. There, plaintiffs mention development that has occurred on the dry sands of Oregon beaches. The Oregon Supreme Court, as a matter of State appellate practice, refused to consider these extra-record "facts." Pet. Cert. App. A5, n.8.

not result in a taking of property that constitutionally must be compensated.

The Oregon Supreme Court correctly decided that the public's recreational easement over plaintiffs' property fit the *Lucas* requirements, and it therefore properly concluded that no compensation is due. Plaintiffs' arguments that the Oregon court reached the wrong result present no substantial federal question for this Court to resolve. The only question of any possible importance is whether the Oregon court's enunciation of the common law doctrine of custom in *Thornton* caught property owners along the beach so by surprise that, even though the principle was part of the State's background principles of property law, it was such an unpredictable pronouncement of state law and so defeated the reasonable expectations of property owners on the beach that its application should not fit the *Lucas* doctrine.

That question is answered by the discussion above of Oregon law. No legislative or judicial decisions had ever renounced the doctrine of custom in Oregon, the Oregon Constitution incorporated the common law as part of the law of Oregon, and at least one early Oregon case, *Hume v. Rogue River Packing Co.*, 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865 (1908), had recognized the existence of the doctrine in Oregon. It cannot credibly be argued that property owners were not on at least constructive notice that the doctrine formed part of Oregon's property law. *Thornton's* articulation of the doctrine of custom as part of the State's property law legitimately cannot be claimed to work a "change in Oregon law." Indeed, plaintiffs do not try to argue that it did.

Moreover, the court in *Thornton*, based on an extensive record before it, addressed whether application of the doctrine would be unfair to owners of beach property:

Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. . . .

The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

254 Or. at 598-99.

Plaintiffs alleged no facts in their complaint, nor have they identified even any extra-record facts, to demonstrate that application of the doctrine to them works any fundamental unfairness. Their claim that the public's recreational easement in the dry sand of Oregon's beaches, particularly in the Cannon Beach area, does not fit *Lucas*, lacks merit and is insubstantial as a federal question.

Plaintiffs identify no reason, beyond their concern with the outcome of this particular case, why the Oregon court's decision merits this Court's discretionary review. They point to no decisions that conflict with this one. They present no argument that resolving the issue in this case will assist other courts in understanding *Lucas* and the scope of its holding. The arguments that plaintiffs present here and that the Court properly may consider are, at best, of questionable merit even limited to the facts of this case. In short, plaintiffs offer nothing of federal importance that would justify this Court's grant of certiorari.

**CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully submitted,

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December 23, 1993

**APPENDIX A**  
**AMENDED COMPLAINT**

1.

Plaintiffs are the owners of certain lands situated in the City of Cannon Beach, Clatsop County, which are particularly described as follows:

Tax Lots 8500 and 8501, Map 51030AD for the City of Cannon Beach.

Plaintiffs are also residents of the City of Cannon Beach, Clatsop County, State of Oregon.

2.

The City of Cannon Beach (hereafter the "City") is a municipality duly organized and incorporate under the laws of the State of Oregon and is subject to suit pursuant to ORS 30.320. The City has asserted jurisdiction over all plaintiffs' land.

3.

The Department of Parks & Recreation (hereafter "Parks & Rec") is an agency of the State of Oregon and is subject to suit pursuant to ORS 30.320. This agency has asserted jurisdiction over plaintiffs' land pursuant to ORS 390.635 and ORS 390.650 et seq.

4.

At all material times, plaintiffs' property, as described in paragraph 1 of the complaint, has been identified in the local comprehensive plan of Cannon Beach as an area where development existed as of January 1, 1977, in that Tax Lots 8500 and 8501 are both vacant beachfront subdivision lots, which have been physically improved by construction of streets and provisions of utilities.

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5.

At all material times, plaintiffs' property has been zoned Residential/Motel by the City of Cannon Beach.

6.

At all material times, plaintiffs' property has been one of two remaining vacant beachfront lots zoned for Residential/Motel use by the City of Cannon Beach.

7.

Plaintiffs are also owners of the Ecola Inn, a beachfront motel in Cannon Beach. Adjacent to the Ecola Inn, to the north is the Surfsands Resort Hotel, owned by Raymond Schultens, now deceased, and Steve Martin. Plaintiffs' vacant property is north of, and adjacent to, the Surfsands Resort Hotel.

8.

On or about July 20, 1979, plaintiffs leased the property described in paragraph 1 of the complaint to Raymond Schultens and Steve Martin. The parties agreed that Messrs. Schultens and Martin would build up to an additional thirty hotel units on the leased property. The lease extends for a fifty (50) year term. Under the terms of the lease, plaintiffs are entitled to lease rental proceeds based on the then current yearly assessed value of the property. Upon termination of the lease, ownership of any buildings on the property reverts to plaintiffs.

9.

On or about January 1, 1985, the Land Use Conservation & Development Commission ("LCDC") amended Goal 18 to require local governments and state and federal agencies to prohibit residential developments and commercial and industrial buildings on beaches.

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10.

On or about October 8, 1986, the City of Cannon Beach implemented Goal 18 by amending Ordinance 79-4A, Section 3.180, to establish the Active Dune & Beach Overlap Zone ("ADBO Zone"). Zoning Ordinance 3.180 prohibits any residential developments or commercial or industrial buildings within the ADBO Zone.

**FIRST CLAIM: AGAINST CITY**  
(Inverse Condemnation)

11.

Plaintiffs hereby reallege paragraphs 1 through 10 of the complaint as though fully set forth herein.

12.

Most of plaintiffs' land, as described in paragraph 1 of the complaint, falls within the Active Dune and Beach Overlap Zone ("ADBO zone") established by City Zoning Ordinance 3.180. A small easterly portion of plaintiffs' land lies outside the ADBO zone, but cannot be used for any economically viable purpose.

13.

It is the express purpose and effect of the Active Dune and Beach Overlap Zone to prohibit all residential development and commercial and industrial buildings within the zone.

14.

On or about December 18, 1989, plaintiffs applied to the City for a conditional use permit to construct a retaining wall on their property to stabilize the property for the aforesaid commercial development.

15.

The conditional use request was denied by the City Planning Commission on March 16, 1990, and, on appeal by the City Council on May 1, 1990. The City's refusal to grant plaintiffs'

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request was premised upon noncompliance with Section 3.180 of the City's Zoning Ordinance (See Exhibit 1, Planning Commission Denial, p. 12 §III A, p. 13 §III C), which prohibits commercial development on the beach. Therefore, compliance with other technical objections to the proposed retaining wall *could not* result in an award of the permit.

16.

Plaintiffs have pursued all available means of relief with the City in an effort to gain some economically viable use of their land, but have been denied all such use of their land by virtue of the complete prohibition on commercial, residential and industrial building imposed by the City within the ADBO zone. So long as their prohibition remains, plaintiffs are denied all economic use of their land.

17.

Plaintiffs have no adequate legal or equitable remedy to effect repeal of said ordinance or to exempt their property from its application.

18.

The City's denial of plaintiffs' petition based upon the ADBO's prohibition of all commercial, residential and industrial building within the ADBO zone constitutes a governmental taking of private property for a public purpose, which violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution as that Amendment applies to state action via the Fourteenth Amendment to the U.S. Constitution.

19.

Plaintiffs have sought just compensation from the City of Cannon Beach but no compensation has been received.

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20.

Plaintiffs are entitled to just compensation under the Oregon and United States Constitutions, as measured by the full economic value of their property at its highest and best use.

21.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

**SECOND CLAIM: AGAINST CITY**

(Inverse Condemnation)

Plaintiffs allege:

22.

Plaintiffs hereby reallege paragraphs 1 through 13 of the complaint, as though fully set forth herein.

23.

Cannon Beach Ordinance 79-4A, Section 3.180 violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution, as the Amendment to the United States Constitution. The ordinance, on its face, is a governmental taking of private property for a public purpose without just compensation.

24.

The City adopted this ordinance on October 8, 1986. Adoption of the ordinance has deprived plaintiffs of all economic use of their property since that date.

25.

Plaintiffs have no adequate legal or equitable remedy to effect repeal of said ordinance or to exempt their property from its application.

26.

Plaintiffs are entitled to damages equivalent to the economic value of their property, at its highest and best use, including loss

of use of the property since the unconstitutional ordinance was adopted.

27.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

### THIRD CLAIM: AGAINST PARK & REC

(Inverse Condemnation)

Plaintiffs allege as follows:

28.

Plaintiffs hereby reallege paragraphs 1 through 20 of the amended complaint, as though fully set forth herein.

29.

Most of plaintiffs' property lies within the "ocean shore" as defined in ORS 390.605, et seq. over which Parks & Rec asserts complete jurisdiction and authority, pursuant to ORS 390.111, OR [sic] 390.620 and ORS 390.635. Parks & Rec further asserts that any "improvements" within the "ocean shore" require Parks & Rec's approval pursuant to ORS 390.640 et seq.

30.

On or about August 24, 1989, plaintiffs applied to Parks & Rec for a permit to build a retaining wall on their property to stabilize the property for commercial development.

31.

The permit request was denied by Parks & Rec on March 8, 1990. Denial of the permit was premised upon noncompliance with LCDC Goal 18 and upon plaintiffs' failure to obtain approval from the City of Cannon Beach, which has also implemented Goal 18. See Exhibit 2, Denial of Permit Request, p. 6(6), p. 9(6), p. 15(e). Therefore, compliance with other technical objections to the retaining wall, as set forth by Parks & Rec, *could not* result in an award of a permit.

32.

Plaintiffs have pursued all available means of relief with Parks & Rec in an effort to gain some economically viable use of their land, but have been denied all such use of their land by virtue of the complete prohibition on commercial, residential and industrial buildings imposed by Parks & Rec seaward of the "ocean shore" zone line. So long as this prohibition remains, plaintiffs are denied all economically viable use of their land.

33.

Parks & Rec's denial of plaintiffs' permit based upon the prohibition of Goal 18 of all commercial, residential and industrial building seaward of the "ocean shore" line constitutes a governmental taking of private property for a public purpose, which violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution as that Amendment applies to state action via the Fourteenth Amendment to the United States Constitution.

34.

Plaintiffs have sought just compensation from the State of Oregon, Department of Parks & Rec, but no compensation has been received.

35.

Plaintiffs are entitled to just compensation under the Oregon and United States Constitutions, as measured by the full economic value of their property at its highest and best use.

36.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

### FOURTH CLAIM: AGAINST PARK & REC

(Inverse Condemnation)

Plaintiffs allege:

37.

Plaintiffs reallege paragraphs 1 through 35 of the complaint, as though fully set forth herein.

38.

Land Use Goal 18, as implemented by Parks & Rec, (See Exhibit 3, pp. 30-21 [sic] ¶2, 5) violates Article I, Section 18 of the Oregon Constitution and the Fifth Amendment to the United States Constitution, as that Amendment applies to the state action via the Fourteenth Amendment to the United States Constitution. This Land Use Goal, which has the rule of law, on its face, constitutes a governmental taking of private property for a public purpose without just compensation.

39.

The State adopted this land use goal on or about January 1, 1985. The adoption and implementation of this land use goal has deprived plaintiffs of all economically viable use of their property since that date.

40.

Plaintiffs are entitled to damages equivalent to the economic value of their property, including loss of use of the property, since the unconstitutional and [sic] use goal was adopted.

41.

Plaintiffs are entitled to costs, disbursements and reasonable attorney's fees at trial and on appeal, pursuant to ORS 20.085.

#### FIFTH CLAIM: AGAINST PARK & REC

(De Novo Review)

Plaintiffs allege:

42.

Plaintiffs reallege paragraphs 1 through 41 of the complaint, as though fully set forth herein.

43.

Plaintiffs petition this court for a de novo review of Parks & Rec's denial of plaintiffs' application for a permit to construct a retaining wall upon plaintiffs' property pursuant to ORS 390.658.

WHEREFORE, plaintiffs respectfully prays [sic] for judgment of this court as follows:

#### 1. FIRST CLAIM: AGAINST CITY

- a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value as its highest and best use as of the date of the City's denial of plaintiffs' conditional use permit.
- b. Costs and attorney's fees.
- c. Such other relief as the court deems just.

#### 2. SECOND CLAIM: AGAINST CITY

- a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best use, from October 8, 1986, the date of enactment of Ordinance 79-4A constituting a taking of private property for public purposes without compensation.
- b. Costs and attorney's fees.
- c. Such other relief as the court deems just.

#### 3. THIRD CLAIM: AGAINST PARK & REC

- a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best use as of March 8, 1990, the date of Parks & Rec's denial of the plaintiffs' permit application.
- b. Costs and attorney's fees.
- c. Such other relief as the court deems just.

#### 4. FOURTH CLAIM: AGAINST PARKS & REC

- a. Damages equal to just compensation, as measured by the plaintiffs' land's economic value at its highest and best

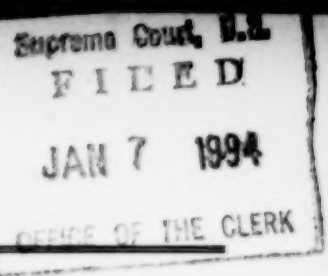
use as of January 1, 1985, the date of enactment of Goal 18, constituting a taking of private property for public purposes with compensation.

- b. Costs and attorney's fees.
- c. Such other relief as the court deems just.

**4. FIFTH CLAIM: AGAINST PARKS & REC**

- a. Following de novo review, a judgment for damages, costs and attorney's fees and such other relief as the court deems just as prayed for in the Third and Fourth Claims.

(5)  
No. 93-496



**IN THE  
SUPREME COURT OF THE UNITED STATES**

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
OREGON, by and through its Department  
of Parks and Recreation,

Respondents.

Petition for a Writ of Certiorari To the  
Supreme Court Of the State of Oregon

PETITIONERS' REPLY MEMORANDUM TO  
RESPONDENTS' BRIEF IN OPPOSITION

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No. 93-496

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1993

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IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF  
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of Parks and Recreation,

Respondents.

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Petition for a Writ of Certiorari to the  
Supreme Court of the State of Oregon

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PETITIONERS' REPLY MEMORANDUM TO  
RESPONDENTS' BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6,  
the Petitioners, Irving C. and Jeanette  
Stevens, respectfully submit this Reply  
Memorandum to Respondents' Brief in  
Opposition.

### REASONS FOR GRANTING THE WRIT

1. This case comes as the inevitable consequence of this Court's recent property rights jurisprudence. The issue raised in this Petition is:

Whether a state may, by judicial decree, retroactively deprive a class of land-owners the right to exclude the public based upon a common law principle of custom never before applied to such property.

Respondents clearly understand this to be the nub of the case, Op. Cert. 1, 15-16, 19-21, and so should this Court.<sup>1</sup>

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<sup>1</sup>Petitioners regard the issue just propounded to be fairly included in the Questions presented, as per Rule 14.1(a) and this Court's decision in Yee v. City of Escondido, 112, S.Ct. 1522, 1532-34 (1992). As noted already, Respondents are manifestly on notice that this is the question in dispute which subsumes each of the arguments made in the Petition. Petitioners will thus be content to argue this issue alone to the Court.

Petitioners' submissions reduce to one unassailable proposition: government cannot take a right in property and justify that taking by asserting that the right never adhered by reason of a custom that had never before been judicially recognized or statutorily codified. The Oregon Supreme Court's decision, from which review is sought here, purports to do just that. Pet. App. A11-A12. The Petitioners hold property, purchased and appropriately-zoned long before the Oregon courts had declared that by reason of custom they could not exclude the public. The decision below results in a permanent public invasion of the property and eradicates viable economic use.

The Supreme Court of Oregon has found a convenient and easy end-run around the barriers to overweening governmental regulation of property erected by this

Court's decisions in such cases as Hughes v. Washington, 389 U.S. 290 (1967); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); and Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). It has been axiomatic in this Court's constitutional treatment of property rights that there can be no denial of due process and no taking by government action unless a land-owner is deprived of an actual right in property. This characterization of rights affected by government action depends, in turn, on the "background principles of nuisance and property law" in a particular jurisdiction. Lucas, 112 S.Ct. at 2901-02. But this Court cautioned in Lucas that a state "must do more than proffer the legislature's declaration that the uses [a landowner] desires are inconsistent with the public

interest, or the conclusory assertion that they violate a common law maxim . . . ." Id. at 2901. A restriction on the use of land, the Court concluded, "cannot be newly decreed or legislated (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." Id. at 2900.

The Oregon Supreme Court failed to heed this warning when it ruled that Petitioners never had a right to exclude the public from the "dry-sand" beach on their property, Pet. App. A11-A12, and, as a consequence, they were not entitled to permits to improve their property at the expense of public access. This right, the Oregon Supreme Court declared, had been lost. How? By virtue of the Oregon Supreme Court's earlier decision in a case called State ex rel.

Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), which had announced that a common law principle of custom, derived from English jurisprudence, applied to create a public recreational easement for all of the state's dry-sand beaches situated on private property. When? Despite the decision in Thornton having been announced in 1969, well after Petitioners' vesting of title, the court below nonetheless believed that Thornton "merely enunciated one of Oregon's 'background principles of . . . the law of property'," Pet. App. A12 (citing Lucas, 112 S.Ct. at 2900), and so Petitioners (it seemed) never possessed the right to exclude the public, not even at the outset of their ownership.

By its decision, the Oregon Supreme Court has simply obliterated a constitutional requirement (whether articulated in a takings or due process

idiom)<sup>2</sup> that notice must be given to property owners when the government purports to take significant -- and valuable -- interests in land. The Oregon Supreme Court's reliance on the common law principle of custom to accomplish this end may seem quirky, if not downright anachronistic. Nonetheless, it was chosen with great care in Thornton and confirmed with deliberate precision in this case. The reason lies in the very nature of the customary doctrine.

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<sup>2</sup>Petitioner intends to argue this point under both the Due Process clause of the Fourteenth Amendment and the Just Compensation guarantee of the Fifth Amendment.

Respondents object, however, that the procedural due process ground was not properly raised below. This is not true, as even a cursory examination of Petitioners' filings will reveal. This issue was briefed before the Oregon Court of Appeals, see Pet. App. vol. II, app. G, at 90-92 & n.3, and before the Oregon Supreme Court, see id., App. H., at 155-63. More importantly, the Oregon Supreme Court passed on this issue when it upheld the retroactive effect of the Thornton decision. See Pet. App. A11-12.

As the Oregon Supreme Court itself explained in Thornton, custom was to be preferred to other mechanisms for the acquisition of public rights in private property, such as prescription, dedication, or public trust. Cases brought under such alternative theories, the Thornton court opined ". . . could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region." 254 Or at 595, 462 P.2d at 676.

The danger that this precept poses to this Court's property rights jurisprudence is immense. The power of the customary principle lies in its application to entire classes of property, not just particularized parcels. As Respondents have themselves argued, Op. Cert. 24 n.9, 28, once a jurisdiction recognizes that any kind of right to private property can be acquired

via custom, all land-owners are on notice that the type of property they own may later become the subject of such a claim. If Oregon was the only state which recognized the principle of customary acquisition of private rights, Petitioners would agree that this case would probably be unworthy of review. But many states have recognized such a doctrine,<sup>3</sup> and have applied it to

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<sup>3</sup>Petitioners have already noted for the Court's benefit, Pet. 14 n.4, those states that have used a rule of custom to find a public right in private dry-sand beaches. These include Hawaii, Florida, and Texas. These decisions were clearly influenced by the Oregon Supreme Court's decision in Thornton. See City of Daytona Beach v. Tona-Rama, 294 So.2d 73, 78 (Fla. 1974); County of Hawaii v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61 (1973), cert. denied, 419 U.S. 872 (1974); Matcha v. Mattox, 711 S.W.2d 95, 98-99 (Tex. Civ. App. 1986) (writ ref'd n.r.e.), cert. denied, 481 U.S. 1024 (1987). See also United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974), aff'd mem., 529 F.2d 513 (3d Cir. 1975) (relying on Thornton, applied custom doctrine to dry-sand beach in U.S. Virgin Islands).

It is worth pointing out that the South Carolina Supreme Court, in the decision

property other than dry-sand beaches.<sup>4</sup> Jurisdictions are likely to find solace in the doctrine precisely because it affords a way to circumvent due process requirements

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reviewed in Lucas, noted that it could have decided the case on the basis of customary rights, but otherwise expressed no opinion on the subject. 304 S.C. 376, 378 n.1, 404 S.E.2d 895, 896 n.1 (1991).

<sup>4</sup>Six additional jurisdictions have decisions accepting the use of custom in granting rights to private property, other than to dry-sand beaches. See, Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (Haw. 1982) (gathering rights); State ex. rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (Idaho 1979) (public access to lake-front); Littlefield v. Maxwell, 31 Me. 134 (1850); Freary v. Cooke, 14 Mass. 488 (1779); Perley v. Langley, 7 N.H. 233 (1834) (right of passage); Nudd v. Hobbs, 17 N.H. 524 (1845) (same); Knowles v. Dow, 22 N.H. 387 (1851) (right to collect seaweed); Post v. Munn, 4 N.J.L. 61 (1818) (navigation over private fishing grounds); Morey v. Fitzgerald, 56 Vt. 487, 490 (1884) (right of passage).

Under the logic of the Oregon Supreme Court's decision and Respondents' position, any of these states, or any other state for that matter, could judicially "recognize" a "pre-existing" public interest in private property without any further notice and without any just compensation.

and just compensation guarantees for entire categories of property. In fact, nothing now prevents other states from adopting custom to impose public easements or other use restrictions on all types of property interests.

2. Aside from minimizing the importance of this issue, Respondents make only one other relevant point. They try to suggest that the Oregon Supreme Court's reliance on its Thornton decision (with its enunciation of a customary public right to privately-held dry-sand beach) was unnecessary to its judgment and that the court below dispensed with Petitioners' claims on other (presumably, independent) grounds. Op. Cert. 13, 16. This is simply not true. The Oregon Supreme Court made clear that the Thornton authority and the doctrine of custom was a necessary legal predicate for the state of Oregon to

legislate beach development restrictions.<sup>5</sup> Respondents actually acknowledge this. Op. Cert. 18.

It is also unnecessary for Petitioners' argument here that the governmental impact on property, achieved retroactively by a court's use of the common law doctrine of custom, work a total (or near total) reduction in the value of the property. Petitioners obviously maintain it did. But Respondents' contention that this case is pointless because the Oregon Supreme Court ruled that no such total diminution in worth had occurred here is irrelevant. It really does not matter; the entire point of this litigation is to challenge the retroactive application of a public easement divined

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<sup>5</sup>"The state concedes that such legislation [ORS 390.610 et seq Oregon Beach Bill] cannot divest a person of his rights in land, Hughes v. Washington, 389 U.S. 290. . ." Thornton, 254 Or at 591, 462 P.2d at 675.

from custom.<sup>6</sup> The Oregon Supreme Court all but acknowledged that this was the decisive -- indeed, the only -- issue in this controversy.

#### CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

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<sup>6</sup>This was the premise of Petitioners' Amended Complaint. See Op. Cert. App. 3-4 (¶¶ 12, 16, 18), 6-7 (¶¶ 29, 31-33). In dismissing the Complaint with prejudice, the trial court explicitly affirmed the principle of Thornton and ruled that Petitioners had no entitlement to use the property in the manner they intended. See Pet. App. vol. I, app. C, at 24. The dismissal with prejudice obviously precluded making a record as to the actual interpretation and impact of Oregon's and Cannon Beach's regulatory schemes. This will have to be accomplished on remand to the trial court.

Respectfully submitted.

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## SUPREME COURT OF THE UNITED STATES

IRVING C. STEVENS AND JEANETTE STEVENS,  
PETITIONERS *v.* CITY OF  
CANNON BEACH ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF OREGON

No. 93-496. Decided March 21, 1994

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins,  
dissenting.

This is a suit by owners of a parcel of beachfront property against the City of Cannon Beach and the State of Oregon. Petitioners purchased the property in 1957. In 1989, they sought a building permit for construction of a seawall on the dry-sand portion of the property. When the permit was denied, they brought this inverse condemnation action against the city in the Circuit Court of Clatsop County, alleging a taking in violation of the Fifth and Fourteenth Amendments. That court dismissed the complaint for failure to state a claim pursuant to Ore. Rule Civ. Proc. 21A(8), on the ground that under *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P. 2d 671 (1969), petitioners never possessed the right to obstruct public access to the dry-sand portion of the property. App. to Pet. for Cert. C-22-C-25. The Court of Appeals, 114 Ore. App. 457, 835 P. 2d 940 (1992), and then the Supreme Court of Oregon, 317 Ore. 131, 854 P. 2d 449 (1993), both relying on *Thornton*, affirmed. The landowners have petitioned this Court for writ of certiorari to the Supreme Court of Oregon. They allege an unconstitutional taking of property without just compensation, and a denial of due process of law.

9/20

In order to clarify the nature of the constitutional questions that the case presents, a brief sketch of Oregon case law involving beachfront property is necessary.

# I

In 1969, the State of Oregon brought suit to enjoin owners of certain beachfront tourist facilities from constructing improvements on the "dry-sand" portion of their properties. The trial court granted an injunction. *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P. 2d 671 (1969). In defending that judgment on appeal to the Supreme Court of Oregon, the State briefed and argued its case on the theory that by implied dedication or prescriptive easement the public had acquired the right to use the dry-sand area for recreational purposes, precluding development. The Supreme Court of Oregon found "a better legal basis" for affirming the decision and decided the case on an entirely different theory:

"[T]he most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." *Id.*, at 595, 462 P. 2d, at 676.

The court set forth what it said were the seven elements of the doctrine of custom<sup>1</sup> and concluded that "[t]he

<sup>1</sup>The Supreme Court of Oregon described the English doctrine of custom as applying to land used in a certain manner (1) so long that the mind runneth not to the contrary; (2) without interruption; (3) peaceably; (4) where the public use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to individual

custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites." *Id.*, at 597, 462 P. 2d, at 677. The court affirmed the injunction, saying that "it takes from no man anything which he has had a legitimate reason to regard as exclusively his." *Id.*, at 599, 462 P. 2d, at 678. Thus, *Thornton* declared as the customary law of Oregon the proposition that the public enjoys a right of recreational use of all dry-sand beach, which denies property owners development rights.

Or so it seemed until 1989. That year, the Supreme Court of Oregon revisited the issue of dry-sand beach in the case of *McDonald v. Halvorson*, 308 Ore. 340, 780 P. 2d 714 (1989). There, the beachfront property owners who were plaintiffs sought a judicial declaration that their property included a portion of dry-sand area adjacent to a cove of the Pacific Ocean. With such a declaration in place, they hoped to gain access (under *Thornton*, as members of the public) to the remaining dry-sand area of the cove lying on property to which the defendants held record title. The State intervened to assert the public's right (under the doctrine of custom) to use the dry-sand area of the cove, and to enjoin defendants from interfering with that right. The Supreme Court of Oregon held that the public had no right to recreational use of the dry-sand portions of the cove beach. 308 Ore., at 360, 780 P. 2d, at 724. *McDonald* noted what it called inconsistencies in *Thornton*, 308 Ore., at 358-359, 780 P. 2d, at 723, and resolved them by stating that "nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast." *Id.*, at 359, 780 P. 2d, at 724. "[T]here may also be [dry-sand] areas," the court said,

landowners as to whether they will recognize the public's right to access; and (7) where the custom is not repugnant to or inconsistent with other customs or laws.

"to which the doctrine of custom is not applicable." *Ibid.*<sup>2</sup> The court noted that "[t]here [was] no testimony in this record showing customary use of the narrow beach on the bank of the cove. . . . The doctrine of custom announced in [*Thornton*] simply does not apply to this controversy. The public has no right to recreational use of the [dry-sand beach area of the cove] because there is no factual predicate for application of the doctrine." *Id.*, at 360, 780 P. 2d, at 724.

With *McDonald* now the leading case interpreting the law of custom, petitioners here brought their takings challenge in the Oregon state trial court. As recited above, that court dismissed for failure to state a claim upon which relief could be granted, saying that "[*Thornton*] teaches us that ocean front owners cannot enclose or develop the dry sand beach area so as to exclude the public therefrom. . . . [B]ecause of the public's ancient and continued use of the dry sand area on the Oregon coast . . . its future use thereof cannot be curtailed or limited." App. to Pet. for Cert. C-24. The trial court did not cite *McDonald*, and its peremptory dismissal prevented petitioners from doing what *McDonald* clearly contemplated their doing: providing the factual predicate for their challenge through testimony of customary use showing that their property is one of those areas "to which the doctrine of custom [was] not applicable." *McDonald*, *supra*, at 359, 780 P. 2d, at 724. Moreover, when petitioners attempted to introduce such factual material on appeal they were rebuffed on grounds that appeal was confined to the purely legal question of whether the complaint stated a claim under Oregon law.

<sup>2</sup>While narrowing *Thornton* in this respect, *McDonald* seemingly expanded it in another: "'Dry-sand area' as used in [*Thornton*] can apply equally to gravel beaches, beaches strewn with or even made up of boulders, and other areas adjacent to the foreshore which, like the beach in [*Thornton*], have long been used for recreational purposes by the general public." 308 Ore., at 359, 780 P. 2d, at 724.

App. to Pet. for Cert. I-197—I-198 (Tr., Mar. 3, 1993); see also *id.*, at I-185—I-190.

In its decision here, the Supreme Court of Oregon quoted portions of *Thornton*'s sweeping language appearing to declare the law of custom for all the Oregon shore. But it then read *Thornton* (which also originated in a dispute over property in Cannon Beach) to have said that the "historic public use of the dry sand area of Cannon Beach met [Blackstone's] requirements." 317 Or., at 140, 854 P. 2d, at 454 (emphasis added).<sup>3</sup> The court then framed the issue as the continuing validity of *Thornton* in light of *Lucas v. South Carolina Coastal Council*, 505 U. S. \_\_\_, (1992). The court quoted our opinion in *Lucas*: "Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 317 Ore., at 142, 854 P. 2d, at 456 (quoting *Lucas*, 505 U. S., at \_\_\_, (slip op., at 23-24) (emphasis added by the Oregon court). The court held that the doctrine of custom was just such a background principle of Oregon property law, and that petitioners never had the prop-

<sup>3</sup>This reading of *Thornton* is in my view unsupportable. *Thornton* did not limit itself to "the dry sand area of Cannon Beach." On the contrary, *Thornton* includes the following statements: "Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." 254 Ore., at 595, 462 P. 2d, at 676. "This case deals solely with the dry-sand area along the Pacific shore . . . ." *Ibid.* "The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites." *Id.*, at 597, 462 P. 2d, at 677. "[T]he custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom . . . must be presumed." *Id.*, at 598, 462 P. 2d, at 678. The passage in which *Thornton* actually applies Blackstone's seven-factor test contains not a single mention of the city of Cannon Beach. *Id.*, at 595-597, 462 P. 2d, at 677.

erty interests that they claim were taken by respondents' decisions and regulations. 317 Ore., at 143, 854 P. 2d, at 456. It then affirmed the dismissal.

## II

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, see *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 455-458 (1958), neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U. S. 290, 296-297 (1967) (Stewart, J., concurring). No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155, 164 (1980). See also *Lucas*, 505 U. S., at \_\_\_, (slip op., at 26). Since opening private property to public use constitutes a taking, see *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831 (1987); *Kaiser Aetna v. United States*, 444 U. S. 164, 178 (1979), if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the land-grab (if there is one) may run the

entire length of the Oregon coast.<sup>4</sup> It is by no means clear that the facts—either as to the entire Oregon coast, or as to the small segment at issue here—meet the requirements for the English doctrine of custom. The requirements set forth by Blackstone included, *inter alia*, that the public right of access be exercised without interruption, and that the custom be obligatory, *i.e.*, in the present context that it not be left to the option of each landowner whether he will recognize the public's right to go on the dry-sand area for recreational purposes. In *Thornton*, however, the Supreme Court of Oregon determined the historical existence of these fact-intensive criteria (as well as five others) in a discussion that took less than one full page of the Pacific Reporter. That is all the more remarkable a feat since the Supreme Court of Oregon was investigating these criteria *in the first instance*; the trial court had not rested its decision on the basis of custom and the state did not argue that theory to the Supreme Court.<sup>5</sup>

<sup>4</sup>From *Thornton* to *McDonald* to the decision below, the Supreme Court of Oregon's vacillations on the scope of the doctrine of custom make it difficult to say how much of the coast is covered. They also reinforce a sense that the court is creating the doctrine rather than describing it.

<sup>5</sup>In *Thornton*, the Supreme Court of Oregon appears to have misread Blackstone in applying the law of custom to the entire Oregon coast. "[C]ustoms . . . affect only the inhabitants of particular districts." 1 W. Blackstone, Commentaries \*74. *McDonald* seems to suggest that a custom may extend to all property "similarly situated" in terms of its physical characteristics, *i.e.*, all dry-sand beach abutting the ocean. 308 Ore., at 359, 780 P. 2d, at 724. That does not appear to comport with Blackstone's requirement that the custom affect "inhabitants of particular districts." See *Post v. Pearsall*, 22 Wend. 425, 440 (N. Y. Ct. Err. 1839); see also *Fitch v. Rawling*, 2 Bl. H. 393, 398-399, 126 Eng. Rep. 614, 616-617 (C. P. 1795) ("Customs must in their nature be confined to individuals of a particular description [and not to all inhabitants of England], and what is common to all mankind, can never be claimed as a custom"); *Sherborn v. Bostock*, Fitzg. 51, 94 Eng. Rep. 648, 649 (K. B. 1729) ("the custom . . . being general, and such a one as may extend to

As I have described, petitioners' takings claim rests upon the assertion *both* that the new-found "doctrine of custom" is a fiction, *and* that if it exists the facts do not support its application to their property. The validity of both those assertions turns upon the facts regarding public entry—but that is no obstacle to our review. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland*, 340 U. S. 268, 271 (1951); see also *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U. S. 537, 540 (1930); *Demorest v. City Bank Farmers Trust Co.*, 321 U. S. 36, 41–43 (1944). What is an obstacle to our review, however, is the fact that neither in the present case (because it was decided on motion to dismiss) nor even in *Thornton* itself (because the doctrine of custom was first injected into the case at the Supreme Court level) was any record concerning the facts compiled. It is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioners' takings claim.

Petitioners' due process claim, however, is another matter. Respondents' brief in opposition does not respond to that claim on its merits, but asserts that petitioners' claim has been "raise[d] for the first time in their petition for certiorari." Brief in Opposition 25. I think not. Petitioners argued before the Court of Appeals of Oregon that since they were not parties to *Thornton*, their rights to dry-sand beach could not have been determined by that decision because they "have not had their day in court." App. to Pet. for Cert. G-90—G-92. In their brief to the Supreme Court of Oregon, they contended that application of *Thornton* to other property owners presented a "serious proble[m] of violation of the . . . due process clause of the Fifth

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every subject, whether a citizen or a stranger, is void").

Amendment." App. to Pet. for Cert. H-155. I believe that petitioners have sufficiently preserved their due process claim, and believe further that the claim is a serious one. Petitioners, who owned this property at the time *Thornton* was decided, were not parties to that litigation. Particularly in light of the utter absence of record support for the crucial factual determinations in that case, whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.

I would grant the petition for certiorari with regard to the due process claim.